Supreme Court, U.S.
FILED

CASE NO. 07-190 JUN 14 2007

OFFICE OF THE CLERK

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 2006

MICHAEL CIEKLINSKI AND ALLAN NAIRN,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May the Appeals Court affirm an *ex post facto* Decision and Order by NLRB "appointees" and a Revised Compliance Determination by a "Regional Director," in over-ruling the Administrative Law Judge and a Board "Chairman" to **vacate** the "ALJ's" Decision, Order, and Compliance Determination **made after the full and fair trial**, proving that **Local Union 357**, the NLRB's *certified exclusive bargaining representative* for all collective bargaining agreement ("CBA") **Employees** - who also administered job-referral procedures for **Employers** - has commited "unfair labor practices" for the sole "benefit" of LU 357's members and the CBA **Employers** who are now liable, with "LU 357," for their "takings" of what are now Petitioners' *damages*, including one Petitioner's preferred *Group One* status on *out-of-work lists* maintained by LU 357.

LIST OF ALL PARTIES

Petitioners/Appellants Michael Cieklinski, and Allan Nairn, and Respondent National Labor Relations Board.

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I. An Administrative Law Judge presided over an NLRB trial and filed a Decision and Order, and Compliance Determination in the charging parties'/plaintiffs' favor, a "Board" *sua sponte* reviewed the "ALJ" rulings - and eviscerated them all, without any trial, in an *ex post facto* Decision and Order (that Board's "Chairman" dissented but was overruled by two remaining Board "members") - and a Regional Director made the Revised Compliance Determination that conflicts with decisions by this Court, and other appellate, and district courts, departs from the usual course of such "judicial proceedings," and requires an exercise of this Supreme Court's powers of supervision.

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STATEMENT OF JURISDICTIONAL GROUNDS

Federal Rule of Appellate Procedure 15(a) provides for appeals from National Labor Relations Board's Decisions and Orders, and includes Compliance Determinations - revised or not - by Regional Directors, and others, delegated or not, as per sections of Labor Management Relations Act §§ 153, and 159 (29 U.S.C. §§ 153, 159), and this Court may review this matter under 29 U.S.C. § 1254(1), and its Rule 10.

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* Respondent NLRB uses NLRA, rather than LMRA cites.

STATEMENT OF THE CASE

The International Brotherhood of Electrical Workers ("IBEW") certifies 40 classifications of "members," but those in affiliated **Inside** local unions ("LUs") violate provisions of IBEW's constitution/contract and rules most, as shown *infra*.

Unfair practices by LU 357 officers and members against Collective Bargaining Agreement ("CBA") Employees LU 357 *was certified, under federal law, to represent* included death threats, assaults, batteries, blacklisting and sabotage, as proved in the Trial of LU 357's officers and members.

A National Labor Relations Board ("NLRB"), created by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq.*), **certified** LU 357, based in Las Vegas, NV, as the "exclusive bargaining representative" for that entire "Bargaining Unit" of **Inside** construction electricians, which is made up of LU 357 members and "non-members," and LU 357 is "affiliated" with the Washington, D.C.-based IBEW.

LMRA § 158(a)(3) requires LU 357 to offer membership to Bargaining Unit Employees within 30 days, but it is never done, and LU 357 has continued to instead overtly favor its members to the detriment of all CBA Employees *who are not its members*, thereby contradicting LU 357's three **exclusive** roles which are: representing CBA Employees in negotiations for collective bargaining agreements ("CBAs"); administering the CBAs; and administering a CBA "grievance procedure."

But LU 357 also administers job Referral Procedures for CBA Employers and forces Employees who are not members to remove themselves from CBA out-of-work lists, by giving LU 357's members the first and best choices of all available requests for workers, and enforcing **practices** of removing all "non-members" who didn't voluntarily remove themselves to its nefarious "side list" on Group One, and by assaulting, battering, and intimidating non-members with death threats, and including "sabotage" of job-sites if CBA Employers fail to "reject" the ironically-named non-member "book-jumpers" from jobs, for merely accepting job offers in their turn.

Petitioners are not "members" of LU 357, but are parties to the IBEW constitution *via* their memberships in the IBEW and two affiliated local unions. LU 357 is wrongfully acting independently of the IBEW constitution. See *Wooddell v. IBEW L.U. 71*, 116 L.Ed.2d 419 (1991).

That IBEW constitution also provides that any "member" of any affiliated local union may *transfer* their "membership" to any other local union with the same "trade classification" by presenting a transferee local union with a *traveling card*.

That constitution doesn't allow any non-member who has not presented a traveling card or been voluntarily accepted by a transferee union, any "voice," or "vote" in any other local union because local unions are not affiliated with each other.
Local 357, and every other "**Inside**" local union, violates that constitution by rejecting **Inside** members' "traveling cards."

Petitioners worked 20 years and 10 years respectively, in the "Inside" *Bargaining Unit* represented by LU 357, which is bound, by law, to "fairly represent" all CBA "Employees" in negotiating, and administering CBAs, and in administering CBA grievance procedures. *Beck v. Communications Workers of America*, etc., *C.W.A. v. Beck*, 108 S.Ct. 2641 (1988).[1/]

Petitioners *aren't members* of LU 357 but qualify for the highest priority *Group One* on CBA Employers' *out-of-work list* created in **Employees' and Employers'** CBA. LU 357 administers that **List** in a hiring hall as the CBA Employers' designated agent, *despite its exclusive state actor certification by that NLRB*, to "represent" all of the CBA Employees.

LU 357 abuses its NLRB-certified "state-actor" CBA role to force *non-members* like Petitioners to "stand aside" (on its non-CBA Group 1 "side list") if their name is called in order from LU 357's CBA out-of-work list, and LU 357 *members*

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[1] There is no provision in the Act for LU 357 to administer Employers' job referral procedure, a conflict of interest that forces them and other non-members to sign out-of-work lists it administered for CBA Employers "on the side" if any LU 357 members had signed the out-of-work lists behind them.

are behind them. Non-members will be given a second offer if jobs remain after LU 357 *members* accept or reject them.

A second offers to any Employee before another has a "first offer" violates the rights of Employees behind them, in Referral Procedure Groups Two through Four, to accept job offers in their turn, and the abuses poison four CBA Groups.

Bargaining Units are made up of Employees who belong to LU 357, Employees who may belong to other local unions affiliated with the IBEW, and Employees who may belong to no union (or other non-affiliated unions), but qualifications for signing out-of-work-lists in every IBEW local union with the "Inside" trade classification are alike, and all applicants for jobs in a Group are subject to identical sets of standards.

Petitioners **did not stand aside**, and accepted first Group One job offers, but LU 357 officers participated in, aided, encouraged and abetted members to threaten and assault them and contacted Employers to have them *rejected* from the jobs they properly accepted, and threatened CBA Employers who refused to "reject" them from employment with job sabotage.

Petitioners were assaulted in LU 357's parking lot by its officers and members, and were "rejected" from job-sites by Employers who were threatened by LU 357's officers while they were driving to the job-sites they chose, and they then filed *charges* with the NLRB which filed a *Complaint* against LU 357, and two of LU 357's officers.

The NLRB's Administrative Law Judge ("ALJ") presided over the trial, and held Petitioners and a "**defined and easily identified class**" of non-members of LU 357 **must be made whole**, in a Decision and Order, but two Board members and a Regional director then limited that "class," and "damages."

The Board members and the Regional Director nullified the ALJ's and Board Chairman's intent to make all the CBA non-members **whole** in an *ex post facto* Decision and Order, and, with a Regional Director, also **subverted** Petitioners' **damages for lost wages, overtime pay, health and pension benefits pay, and travel Costs, and interest** in a July 15, 2005 Revised Compliance Determination.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review Circuit dismissals of a Petition For Review on grounds Petitioners lack standing to challenge the Board's Decision and Order and a "Regional Director's" Revised Compliance Determination. That Board published three "Decisions" from proceedings below out-of-order to confuse and distort the record.

The "Board" deliberately confused the ALJ's Decision, Order, and Compliance Determination with that *ex post facto* internal Decision and Order by itself, and with the Revised Compliance Determination by its venal "Regional Director."

The Board published that ALJ's ethical Decision, Order, and Compliance Determination second to give its self-serving misplaced Decision And Order, and its "Regional Director's" abominable Revised Compliance Determination the credibility it will not get by publishing tainted decisions out of order.

LU 357 **took** a full third of Petitioners' wages for its *dues*, trusts, funds and committees funded in closed-to-non-members meetings, the IBEW's secret agent takes 3% of all wages for a pension fund without authority and contrary to law, despite the fact neither Petitioner is a member, neither is offered membership and separate, independent IBEW has no right to take any monies from Petitioners' earned wages.

The Trial records are full of evidence of subversions of Petitioners' rights, assaults, batteries, blacklistings, bribery, death threats, and sabotage against them and Employers.

The ALJ held LU 357 wrongdoings against non-members violated its duty to represent all applicants for employment fairly and impartially, are convincing evidence of approval, ignored an opportunity to address problems when Cieklinski had a hearing before an "Appeals Committee," and restrained and coerced non-members into surrendering job referrals to LU 357 members. An appeal court erred by misrepresenting Petitioners had not exhausted their administrative remedies where administrative "remedies" were repeatedly exhausted, and Cieklinski even tried for an Appeals Committee remedy.

1) ***LU 357 had no right to administer job referral procedures for CBA Employers, or limit Employees' right to accept jobs.***

LU 357 is an *exclusive bargaining representative* of CBA Employees and had no **standing** to cut a side-deal with CBA Employers to coerce Employees who aren't LU 357 members out of their CBA rights to accept any, or all "job offers." The LMRA's policy "is to insulate employees' jobs from any organizational rights." *Radio Officers' Union of Commercial Telegraphers*, 74 S.Ct. 323, 335 (1954). LU 357 is bound to fairly "represent" all CBA "Employees" in negotiating, and administering CBAs, and administering CBA grievance procedures. *Beck v. Communications Workers of America*, etc., through *C.W.A. v. Beck*, 108 S.Ct. 2641 (1988).

LU 357 serves its own interest rather than the interest of all Employees in administering CBA job referral procedures and it should limit itself to "administering" within the laws.

Non-members who qualify for jobs as Referral Procedure Group One applicants have an exclusive right to "job offers" under the law, and it is ludicrous for LU 357 members, and officers to even suggest - let alone insist - they have a "right" permitting them to assault, batter and blacklist non-members.

LU 357 violated LMRA §§ 158(b)(1)(A) and (b)(2) by encouraging, aiding, and abetting its officers' and members' threats, assaults, batteries and interferences with other CBA Employees who are not its "members."

The Regional Director who wrote a "*Revised Compliance Determination*" misrepresented that "CBAs" are between the "Respondent [union] and various employers" to harass one of the Petitioners for three pages, in the face of facts that he has lived in Las Vegas for 21 years, but had to move his family across the State line to California because of LU 357 threats.

The *Revised Compliance Determination* attacks the ALJ's cogent, fair Decision, Order, and Compliance Determination. The Board is little more than a modern *hydra*, created to free Federal courts from "Actions" by citizens who apparently are not considered sophisticated enough to enjoy a Constitution.

2) *LU 357, IBEW, union affiliates, an NLRB, and Employers can access Employees' CBA records, but Employees may not.*

LU 357 and a Board accessed all Employees' records of wages, dues, trusts, funds and committees but the Employees could not, and Board officers had wonderful "rapports" with LU 357 officers, even introducing Local 357 officers to the presiding ALJ as they came into the courtroom (courtesies not extended to the Petitioners they represented).

The IBEW constitution/contract is with, and between all IBEW and local union "members," and with, but not between all local unions. Thus, personal contact between Petitioners and the ALJ was limited by their counsel even as the counsel extended it to the LU 357 Respondents. In fact, the Board's Regional Director used LU 357 records to attack Petitioners' prevailing Decision, Order and Compliance Determination as it supposedly "represented" them in that Revised Compliance Determination, which was merely a follow-up to that Board's irrational, duplicitous, and damning Decision and Order.

The Board, which ostensibly represented Petitioners, did everything in its power, working in concert with a "Regional Director," to subvert Petitioners' Case, even to the extreme of publishing three decisions into the Board's volumes as one Decision (not even a "caption" for that Case before the ALJ).

In fact an *ex post facto* Decision and Order, by Members and a Board Chairman, was placed first in the NLRB reports even though it was not the result of a "trial," and indicts that Board for not placing it second. The ALJ's Decision, Order, and built-in Compliance Determination that should have been published first as the result of that Trial of the losing LU 357 Respondents, is published second, but an outrageously tainted Revised Compliance Determination is justifiably last.

A Revised Compliance Determination refers to "refused [job] referrals," but the Board "lost th[at] issue" and is now precluded from showing Petitioners had any duty to mitigate. *NLRB v. Laborers' Union*, 748 F.2d 1001 (5th Cir. 1984), *cert. denied*, 479 U.S. 1085, 105 S.Ct. 1845 (1985).

3) *LMRA precedents are limited to "wrongdoings" of unions and employers, but NLRB members, and a Regional Director filed a Revised Compliance Determination abusing facts and law so bad the NLRB itself is causing Petitioners' damages.*

This Court has decided that the NLRB is precluded from even attempting to show that Petitioners refused referrals or had a duty to mitigate any damages caused them by LU 357 or Employers who are parties to CBAs with Employees. See *supra*, at p. 8, *citing NLRB v. Laborers' Union*, 748 F.2d 1001 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1845 (1985).

The NLRB delegated its authority to itself (a 3-member Board) on December 16, 2004, and agreed LU 357 violated LMRA § 158(b)(1)(A) by restraining and coercing Cieklinski and Nairn into surrendering job referrals to LU 357 members on four dates beginning March 7, 2003, and directed LU 357 to make them whole, but split hairs to avoid identifying other similarly-coerced CBA Group One non-members of LU 357.

Petitioners object to the Board's abuse of **off-point** terms like "traveler," and "stand aside custom" - abused by LU 357 officers - to identify CBA employees not LU 357's members.

That Board ordered LU 357 to (1) cease and desist from: (a) its "side-list" practice; (b) threatening non-members with denial of membership and loss of jobs; (c) restraining and coercing them into surrendering job referrals to LU 357 members; (d) refusing them access to hiring hall "books" and all other records, including "side lists"; (e) requesting employers to not hire non-members; (f) causing employers to refuse to hire non-members; and to: (2)(a) enforce hiring hall practices that do not coerce "non-members" to surrender job referrals; (b) make Cieklinski and Nairn whole, plus interest, for any losses resulting from LU 357's unlawful conduct; (c) provide all records necessary to analyze the amounts of back pay that are due (with federal court interest), and owed them.

On July 15, 2005 an NLRB *Regional Director* provided Cieklinski with a Revised Compliance Determination of *back pay* LU 357 accepted but Cieklinski did not because back pay

inadequate and the venal *Regional Director* then reduced his out-of-work list registration status with LU 357 to **Group Two**, making it impossible for Cieklinski to earn a living.

That *Regional Director* may not abuse the same tortious CBA out-of-work list "registration status" threats and actions LU 357 used to continue denying Cieklinski and Nairn access to jobs and wages, especially since no "big stick" strategy was used on Local 357 and the NLRB confined itself to using the law and its judges and courts, but quickly used abuse-as- method on the two Petitioners, with the same rejection-result.

That *Regional Director* had no "charge," "complaint," or "standing" to launch any personal vendetta against Cieklinski and Nairn for disagreeing with a *Regional Director* over the amounts of damages they incurred as a result of unfair labor practices by a wrongdoing union that *Director* is in bed with.

Cieklinski and Nairn were *the charging parties* before the Board and the two victims of LU 357's wrongdoing may not be attacked freely by a servant of an entity that uses public money to stop wrongs, but now, through a *Regional Director* is misusing public money to abuse those very same victims.

That *Regional Director* interfered with Cieklinski's CBA Group One *standing* by depriving him of his CBA Referral Procedure "out-of-work list" status, and it is impossible to ignore the NLRB, through its venal *Regional Director*, has committed a same "tort" against Cieklinski that LU 357 did.

The NLRB filed a *Charge* and *Complaint* against LU 357 for violating the same laws that *Regional Director* violated by abusing both Cieklinski's status, and his and Nairn's status.

Of course the Board is aware that Cieklinski, Nairn and their families depend on their ability to practice their trade, but attacked with a same venality as LU 357 to deprive them of a same ability, knowing it has the same adverse effects.

A *Regional Director* committed "unfair labor practices" by altering Cieklinski's CBA job Referral Procedure "Group One" status to "Group Two" where he can't survive and it is apparent from that *Director's* fourteen page analysis that Mr. Cieklinski's CBA status isn't a *Regional Director's* business.

4) *The NLRB argued on appeal that neither its unilateral Decision and Order - filed after that ALJ's Decision, Order and Compliance Determination voluntarily participated in by all the parties - nor its Revised Compliance Determination is appealable, and Petitioners agree, but for different reasons.*

NLRB received Cieklinski's and Nairn's Charges against LU 357, investigated, filed *Complaints*, held a "Trial" of LU 357 and its agents, and the ALJ filed a Decision, Order, and partial Compliance Determination of Petitioners' damage, but was removed in favor of an ethics-free "Regional Director."

That should have been the end of the matter, except for possible problems collecting "damages" but an NLRB clearly demonstrated reluctance to award any damages to "victims" other than a charging party who did not welcome associations with Cieklinski or Nairn, and, like LU 357 top officer Davy Jones, considers himself to be a permanent resident of North Carolina, and received "damages" in an unknown amount.

But Petitioners Cieklinski and Nairn did not receive any "damages" offers that even remotely resembled "satisfaction" for ostracizings, assaults, batteries, humiliation, loss of jobs (continuing in Las Vegas), expenses incurred chasing jobs in other CBA jurisdictions or for wages lost in attempts to live off the bottoms of CBA "out-of work lists" that also reacted negatively to the exportations of American industries.

In fact, NLRB's Cornele Overstreet, a Regional Director who had LU 357 punitively reduce Cieklinski's "out-of-work list" status at home from Group One to Group Two, who had no right to discipline Cieklinski, whose "charge" against LU 357 was upheld and acted on by that presiding ALJ, who saw the bigger "case" picture, unlike "hit-person" Overstreet.[2/]

It is very obvious that the NLRB no longer fulfills any role intended by Congress, when it was reduced in 1947, and the federal courts should acknowledge the inadequacy of their intended NLRB "agents," as the Congress did in 1947, and instead give all citizens equal access to those courts.

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[2] The ALJ left before finishing Petitioners' damage awards.

APPENDIX

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Unfair Labor Practice by employer or labor organization
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Labor Management Relations Act § 158 (29 U.S.C. § 158). Unfair Labor Practice by employer or labor organization (29 U.S.C. §§ 158(a)(3), 158(b)(1)(A), and 158(b)(2).

(a) Unfair labor practices by employer.

It shall be an unfair labor practice for an employer --

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United states, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later....

* * *

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein ....

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership ....

International Brotherhood of Electrical Workers ("IBEW")
Constitution Article XX, Sec. 1 and Sec. 3.

ADMISSION OF MEMBERS.

Sec. 1. No Local Union ("L.U.") can admit an applicant who does not reside in, or who is not employed in the trade, in the jurisdiction of the L.U., unless the L.U. is directed to admit him by the I.P. (International President).

* * *

Sec. 3. The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W., and between such member and all other members of the I.B.E.W.

International Brotherhood of Electrical Workers ("IBEW")
Constitution Article XXIII, Sec. 1., Sec. 2, and Sec. 10.

TRAVELING CARDS.

Sec. 1. Any member working in a different L.U.'s jurisdiction shall be admitted to its meeting, provided that he presents his official receipt for dues showing he is a member in good standing and he identifies himself as the rightful owner of such receipt, but he will have no voice or vote at such meeting, except as required by law.

Any member visiting a different L.U. may be admitted to its meeting at the option of the L.U., provided that he presents his official receipt for dues showing he is a member in good standing and identifies himself as the rightful owner of such receipt, but he will have no voice or vote at such meeting.

Sec. 2. Any member desiring to transfer his membership may apply to his F[inancial] S[ecretary] for a traveling card for a stated time not to exceed three (3) months. The card shall be null and void unless deposited in some L.U. or renewed by the L.U. granting it on or before the date of its expiration. No fraction of a month shall be recognized, and all cards must date from the first date of the month and expire on the last day of the month.

* * *

Sec. 10. No L.U. shall refuse to accept promptly the card of and readmit any member into his home L.U. provide he has maintained his continuous good standing in the I.B.E.W. while absent from the L.U. The L.U. where a member was originally admitted into the I.B.E.W. shall be considered his home L.U. Where a L.U. or any part thereof has been amalgamated into another L.U. that L.U. shall be considered the home L.U.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Michael Cieklinski, and Allan Nairn, Petitioners, v. National Local Relations Board, Respondent.	**No. 05-75079** **NLRB Nos. 28-CB-6013 28-CB-5957** **MEMORANDUM****

On Petition for Review of an Order of the National Labor Relations Board

Submitted March 12, 2007***

Before: Kosinski, Leavy, and Bybee, Circuit Judges.

Michael Cieklinski and Allan Nairn petition pro se for review of a decision of the National Labor Relations Board ("NLRB") limiting an award of damages to identified traveling workers whose federal statutory rights had been violated by a local union. We dismiss the petition for review.

Petitioners lack standing to chall-enge the NLRB's order affirming the award of damages to petitioners, and setting aside the award of damages to unidentified

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* The Clerk shall amend the docket to reflect that Allan Nairn is also a Petitioner in this case.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir.R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

traveling workers. See 29 U.S.C. § 160(f) (any person "aggrieved" by a final order of the NLRB may obtain review in court of appeals); *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 610 (9th Cir. 2005) (a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties") (quoting *Warth v. Seldin*, 422 U. S. 490, 499 (1975).

We also lack jurisdiction to review the back-pay computation because petitioners did not exhaust their administrative remedies by appealing the computation to the General Counsel and then to the NLRB. *See* 29 C.F.R. § 102.53; *Nat'l Labor Relations Bd. v. Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982) ("failure to exhaust administrative procedures ... precludes review of [an] issue" in a court of appeal) (citation omitted). Consequently, there is no final order of the NLRB for this court to review. See 29 U.S.C. § 160(f).

We deny all pending motions.

PETITION FOR REVIEW DISMISSED.

Supreme Court, U.S.
FILED
07-190 JUN 14 2007
OFFICE OF THE CLERK

CASE NO. _____

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 2006

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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International Brotherhood of Electrical Workers, Local 357, AFL-CIO (Newtron Heat Trace, Inc.) ***and*** **Michael J. Cieklinski and Richard Brian Henderson.** Cases 28-CB-5957 and 28-CB-6013.

June 15, 2004

DECISION and ORDER

I. STATEMENT OF THE CASE

Lana H. Parks. Administrative Law Judge. This matter was tried in Las Vegas, Nevada on March 9 and 10, 2004 on an order further consolidating cases, second consolidated complaint and notice of hearing (the complaint) issued on November 26, 2003[1/] by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based on charges filed respectively by Michael Cieklinski and Richard Brian Henderson, individuals. The complaint originally named Newtron Heat Trace, Inc. (Newtron) as a Respondent. At the hearing, counsel for the General Counsel represented Newtron had entered into a settlement agreement resolving the charges against it. I granted counsel for the General Counsel's motion to sever Newtron from the complaint. The complaint, as amended at the hearing, alleges International Brotherhood of Electrical Workers, Local 357, AFL-CIO (Respondent or Local 357) violated Section 8(b)(1)(A) and (2) of a National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did Respondent maintain a practice and procedure whereby hiring hall applicants who were members of other local unions of the international Brotherhood of Electrical Workers, AFL-CIO (travelers) surrendered dispatch referrals to Local 357 members and obtained dispatch only after all

[1] All dates herein are 2003 unless otherwise specified.

Local 357 members had been afforded an opportunity for dispatch to work?

2. During relevant times, did Respondent apply the above practice to charging parties Michael Cieklinski and Richard Henderson, and to other travelers, including Al Nairn and others similarly situated?

3. Did Respondent restrain and coerce travelers into surrendering dispatch referrals to Respondent's members by participating in, acquiescing in, or failing to take any action against Respondent's members who threatened bodily harm and discouraged travelers who were issued dispatch referrals?

4. Did Respondent threaten travelers with denial of local membership and a resulting loss of job opportunities because they wouldn't surrender dispatch referrals to local members?

5. Did Respondent fail and refuse to provide copies of an alternate job referral list (side list) to a traveler who had requested them?

6. Did Respondent cause or attempt to cause Newtron to refuse to hire and/or to discharge Mr. Henderson for reasons other than his failure to tender uniformly required fees and periodic dues?

7. Did Respondent cause or attempt to cause Newtron to refuse to hire Cieklinski for reasons other than his failure to tender uniformly required fees and periodic dues?

III. JURISDICTION

Newtron, a Louisiana corporation with a place of business located in Primm, Nevada, has been engaged as a heat trace contractor in the construction industry, doing commercial and industrial construction. During a 12-month period ending on October 31 Newtron in conducting its business operations described above, annually purchased and received at its place of business in Primm, goods and services valued in excess of $50,000 directly from points outside the State of Nevada. In its answer to the complaint, Newtron admitted, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the

Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.[2/]

IV. THE FACTS

At all times relevant hereto Respondent has been signatory to collective-bargaining agreements with Newtron and other contractors performing construction industry work in and around Clark County, Nevada, which provide, inter alia, for recognition of Respondent as the exclusive collective bargaining representative of the employees of Respondent in the classifications of general foreman, journeyman wireman, technician and journeyman cable splicer, among other classifications with respect to rates of pay, wages, hours of employment, processing of grievances and other terms and conditions of employment. Respondent maintained with Newtron and other area contractors agreements requiring that Respondent be the exclusive source of referrals of employees for employment with Newtron and other area contractors engaged in the construction industry. To that end, Respondent maintains a construction dispatch/referral system from its hiring hall and office facility in Las Vegas. During 2003, pursuant to a contractual dispatch/referral system Respondent has dispatched electrical construction workers to Newtron at its Big Horn construction jobsite located in Primm, Nevada.

Simply described, Respondent's dispatch/referral system operates as follows: the inside construction agreement (inside agreement) provides that out-of-work International Brotherhood of Electrical Workers union (IBEW) members desiring employment may sign up in one of four "books"[3/] depending on their meeting applicable criteria. Those who sign in book

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[2] Where not otherwise noted the findings herein are based on pleadings, stipulations of counsel, or credible evidence.

[3] The Inside Agreement where criteria for book eligibility is set out identifies eligibility gradations as Group I, II, III, and IV. As witnesses refer to eligibility categories as "Books," I have used that "Book" term herein.

one are the first to be offered dispatch to available jobs. The eligible criteria for book one is as follows:

> All applicants for employment who have four (4) or more years experience in the trade, are residents[4/] of the geographical area constituting the normal construction labor market,[5/] have passed a journeyman examination by a duly constituted Inside Construction Local Union of the IBEW or been certified as a journeyman wireman by any Inside Joint Apprenticeship and Training Committee and who have been employed in the trade for a period of at least one (1) year in the last four (4) years in the area covered by the collective bargaining agreement.

When signatory construction companies need employees in classifications encompassed by the agreement they notify the hiring hall, which in turn announces or offers available jobs to those signed in on book one in order of position on the out-of-work list. Membership in Respondent is not required; members of other IBEW locals throughout the United States who aren't members of Respondent, i.e. travelers, may upon proof of good standing sign up for job referrals in the book for which they are eligible, including book one.[6/] When a worker's name is called from the book one out-of-work list, the worker may choose from jobs still available for dispatch.

For many years it has been the custom at the Respondent's

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[4] The definition of resident is set out in sec. 3.09 of the inside agreement: a person who has maintained a permanent home in the above-defined geographical area for a period of not less than a year, or who has temporarily left with the intent of returning to this area as his permanent home.

[5] The geographic area is specified in sec. 3.08 of the CBA: Clark and Lincoln Counties, and that portion of Nye County south of the Mt. Diablo Base Line, State of Nevada.

[6] At the time of the hearing travelers made up approximately 18 percent of book one signers.

hiring hall for travelers with book one eligibility to ask that their names be put on an informal "side list" for deferred dispatch after Respondent afforded dispatch opportunity to all Local 357 book one signers (the side-list practice). According to Union agents Jeff Westover and Terry Large it was an accepted "courtesy" to Local 357 members, knowledge of which was disseminated by word of mouth. Compliance with the custom entailed no particular hardship to travelers when ample work existed.

By stipulation of the parties the following possessed the designated titles and acted as agents of Respondent within the meaning of the Act during periods relevant to this case:

David R. jones (Jones)	Business Manager
Jeff Westover (Westover)	Assistant Business Manager
Terry Large (Large)	Dispatcher
Lonnie Bennington (Bennington)	Dispatcher
Bill Poma (Poma)	Agent

Respondent denied the agency status of Brian Egge (Egge), steward, and Edward Gering (Gering), a Local 357 member, sometimes organizer, and chairman of the Union's executive committee. During the relevant period Egge served as Respondent's steward for Newtron's IBEW employees at the Big Horn jobsite. While in that position Egge discussed employer complaints, safety issues and pay raises with the jobsite supervisor, had authority to write grievances and to resolve them and serve as liason between Respondent and the jobsite. Egge checked dues receipts of workers reporting to that job to see if they were current and if not, told them to pay. Gering held the position of union organizer with Respondent from August 2001 to July 28, 2003 resuming that position in February 2004. During 2003 Gering was the chairperson of Respondent's unit one (inside journeyman wiring) executive committee, which met monthly to, inter alia, review local union membership applications and report to the executive board if applicants met the criteria. At all relevant times,

charging party Henderson was a member of IBEW Local 342 in Winston Salem, North Carolina (his home local). He was not a member of Respondent. In recent years Henderson has been a resident of Las Vegas and received dispatches from Local 357 as a traveler.[7] At all relevant times Charging Party Cieklinski was a member of IBEW Local 1426 in Grand Forks, North Dakota (his home local). Although not a member of Respondent, since 1982 Cieklinski has been a resident of Las Vegas and received dispatches from Local 357 as a traveler.

Prior to 2003 Henderson and Cieklinski had complied with Local 357's custom regarding travelers declining dispatches from book one when members had not yet been dispatched, by going to the dispatch window when their names were called and asking to be put "on the side." The dispatcher then listed their names on a piece of scratch paper to the side of book one, which list the dispatcher referred from when all eligible local members who wanted jobs accepted dispatch.

Beginning in January Cieklinski noticed a larger number than before of Local 357 members signing book one, which he attributed to successful union organization drives swelling Respondent's membership numbers. With increased numbers of local members on book one Cieklinski regularly had to turn down dispatches to comply with the side list custom.

On March 7 Cieklinski telephoned IBEW Ninth District representative Dave Tilmont (Tilmont) about the side-list situation at Local 357. Mr Tilmont suggested he write Michael S. Mowrey (Mowrey), vice-president of IBEW District 9. Prior to dispatch on that same day, Cieklinski spoke to Westover about the problem, telling him he would have to take a job that day without going on the side list in order to feed his family. Westover told him he was entitled to the call if he so chose, but there were ramifications, and warned, "Those members that don't choose to step aside as a courtesy usually

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[7] Henderson unsuccessfully sought membership in Local 357; there is no allegation related to denial of membership.

won't get membership [in Local 357]." He wished Cieklinski luck. Later that day when Dispatcher Large called his name, Cieklinski accepted a job with Bechtel Construction Company and Large asked, "Are you sure you want to do this?"[8/]

Cieklinski said he did and Westover told Large to give him the call. Large asked again if Cieklinski was sure he wanted to accept it, saying "You're only going to work 41 hours."[9/] Mr. Cieklinski had just moved one or two steps beyond the dispatch window when a man identifying himself as a Local 357 member whose name was below his on the out-of-work list accosted him, called him a f_ tramp, and said, "You are taking my job." Cieklinski told him he had a right to take the call. Other persons in the room yelled to him, "Do you want to get your ass kicked?" "Turn the call back in," and "Do the right thing." Cieklinski returned to the window and gave the job call back to Large and Westover. Neither commented on his change of heart.

Following the events of March 7 Cieklinski by letter dated March 10, complained to Mowrey about Local 357's "book one-on the side practice," which severely limited job opportunities for travelers. He related the occurrences of March 7, pointing out that he had already told Tilmont about the situation and he had been unemployed since January 8 because of

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[8] Large denied asking Cieklinski if he was sure he wanted to take the call. He admitted Cieklinski's acceptance of the call was a "highly" unusual circumstance. I did not find Large to be a reliable witness, and I do not credit his testimony where it conflicts with that of Cieklinski and Henderson.

[9] An individual may maintain his/her position on the out-of-work list if the job lasts less than 40 hours. If more than 40 hours is worked the individual's name goes to the bottom of the list. Cieklinski didn't know how Large knew the Bechtel job would last only 41 hours as it had not been announced as a short call job (a job lasting less than 40 hours). Cieklinski believed Large was threatening he would make sure the job lasted only 41 hours.

the practice. He asked for intervention:

> All I am asking is that Local # 357 uphold the integrity of the union and stop condoning the practice of men having to go "on the side." Back in the old days job calls were distributed fairly and everyone had the same opportunity for job call offers. Book One was book one. Mr. Mowrey I am asking that you please look into this problem at your earliest convenience.

By letter dated March 17 Mowrey responded that the referral procedure was created by the agreement between the Local Union and the Employer:

> It is important to note...that it is the Local Union and not the International that serves as your exclusive bargaining representative.... For these reasons there is no formal procedure under which I can entertain your complaint against the Local Union. Nevertheless, in order to attempt to assist you in an informal way I am assigning International Representative Tilmont to inquire further about the matters you have raised in your letter. In the meantime I would suggest that you pursue whatever additional steps may be available to you, possibly a request to be heard by the "Referral Appeals Committee."

In response to Mowrey's assignment Tilmont apparently made some effort to resolve the situation, although he didn't recall "anything specific." According to Cieklinski, Tilmont reported to him that he had tried to set up a meeting between Respondent's business manager Jones and Cieklinski, but he refused. Although Tilmont denied Jones refused to meet he admitted talking to Jones about Cieklinski's complaint.[10/]

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[10] I credit Cieklinski's account of what Tilmont told him. I found Cieklinski to be a believable witness, but Tilmont to be less open, and somewhat constrained in giving testimony.

By letter dated March 25, Cieklinski asked for an Appeals Committee hearing regarding the referral procedure integrity. By letter of March 31, Mickey Miles (Miles), Respondent's president, informed Cieklinski to submit a formal complaint and proposed remedy to the committee. By letter dated April 8, Cieklinski did so, outlining all that had occurred on March 7 when he accepted a dispatch, including threats and intimidation directed toward him by Local 357 members. Miles set an appeals committee hearing for April 28.

On April 28 Cieklinski attended the hearing of the appeals committee. Henderson, and Nairn were also present. Miles, a contractor's associate, and the head of the joint apprentice-training center formed the hearing committee.[11/] The committee told Cieklinski, Henderson, and Nairn that when their names were called in the hiring hall, they should just take the call. At some point following the hearing, the appeals committee issued an undated decision, which stated the committee found no violation of the inside agreement. During this period rumors circulated in the hiring hall that travelers were accepting jobs without going on the side, and Local 357 members raised an issue in union meetings "all the time," according to Gering. Local 357 members contacted Gering because they knew he had a position with Respondent and talked to him about travelers taking dispatches.

During the relevant period herein, Ken Allen and Kevin Bellard (Allen and Bellard) supervisor and general foreman,

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[11] Cieklinski did not recount what he said at that hearing. Miles was vague about what Cieklinski said, testifying that although Cieklinski referred to a March 7 incident he "didn't get the feeling" that Cieklinski had said he felt threatened by a Local 357 member. It is inherently incongruous that Cieklinski would not have repeated at least the information he provided in his appeals request of April 8. Moreover, the committee must have read his appeal and must have known what Cieklinski asserted he had experienced. I find Miles testimony equivocal at best, and I do not rely on it.

respectively, of Newtron were responsible for hiring and firing employees at Newtron's Big Horn Powerhouse jobsite (Big horn job). In mid-May Newtron placed a request with Respondent's hiring hall for one electrical worker. The dispatch for that job was to be made on May 16.

Having been out of work for about 8 months, in mid-May Henderson decided to accept a dispatch even though it meant "jumping the book." (A book-jumper is a nonmember of Local 357 who, having legitimately attained eligibility for and signed up in book one, accepts a job referral while Local 357 signers farther down on the list remain undispatched.) Henderson was at that time, at the top of the book one out-of-work list. Having learned by calling the job line that a dispatch to Newtron, a desirable job, would be offered in the hiring hall on May 16, Henderson reported to the hiring hall on that date. When the dispatcher, Large called his name Henderson went to the window and said he wanted to go to Newtron. Large asked if that was what he wanted, and Henderson said yes. As he waited for his referral paperwork, Henderson audiotaped conversations between him and Local 357 members. Counsel for the General Counsel caused a transcript of the tapes to be prepared for which Henderson later identified speakers. While the tapes were played in court the parties compared the audio to the transcript. Although some of the interaction on the tapes is not audible because of loud background and covering noise, much of it, particularly those conversations herein referenced, occurs in relative quiet.[12/] The taped conversations, in pertinent part, are set forth below:

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[12] Although objecting at the hearing to introduction of the tapes, Respondent states in its posthearing brief, "In that Henderson produced a tape recording of comments made to him on May 16, 2003 after taking the dispatch, what was said to him cannot be credibly debated."

Date and Place of Conversations
Dispatch Room of the Hiring Hall

May 16

Speakers

Mr. Henderson
Vick Snow (Mr. Snow), Local 357 member
Richard Avena (Mr. Avena), Local 357 member
Allan Nairn (Mr. Nairn), Traveler
Ms. Bennington, dispatcher
Numerous unidentified voices

Conversations

Mr. Snow: Are you on the side?

Mr. Henderson: Yeah.

Mr. Snow: Well, you just stepped up there...on all your brothers and took a job?

Mr. Henderson: Yeah.

Mr. Snow: That's f___ up...How would you feel if I went to your local and did the same thing?...Now the proper thing to do is to step back to the window and give that call back to a brother that needs a job...You're f____ up... Where you out of?

Mr. Henderson: 342.

...

Mr. Henderson: What page you on?

Mr. Snow: I just signed the books today.

Mr. Henderson: So? I been on the books for eight months. I been in there since '96.

Mr. Snow: You're on the side.

Mr. Henderson: I been in this town since '96.

...

Mr. Snow: Its f_____ up when you jump in front the brothers and take another f___ call...And I'll make sure that every man in that hall knows-knows that you did it too. The

proper thing to do is go back to the window and say, "Here, I'm not taking this call."

[Pause of approximately 4 minutes with noisy voices.]

Unidentified male: Dude, you screwed me out of a call.

...

Unidentified male: He took a call.

Unidentified male: You're sh____ me.

Mr. Snow: Like I said, brother, proper thing to do is go get your ticket back and give back the call to somebody else...You won't lose your place on the books or anything else. That's the proper thing to do...You don't like [the way] this local works, then you go back home.

[Other unidentified persons loudly questioned and jibed at Henderson for accepting a dispatch. Snow continued to urge Henderson to give up his dispatch as Henderson inquired at the window when his referral would be out.]

Mr. Snow: You want to save face? You know, if your name gets out on the street for doing that sh_, it's going to hurt you. If you walk up there right now, everything will be forgiven...I mean if you want to continue to work here, you know.

[Voices talking at the same time.]

Unidentified male: Hey, you got a home here and everything, man. If you want to live here, you got to do the right thing.

....

Mr. Snow: I asked him to step outside. He wanted - he wanted to open it up right here in the middle of the floor, so I did.

Unidentified male: Yeah, I want to set him on fire, you know.

Mr. Snow: I told him we'd do it in private, but no, he wanted everybody to hear, so now everybody's gonna know.

[Mr. Henderson inquires again about his referral.]

Mr. Henderson: They aren't gonna give me my referral or what?...Won't give me my referral. That's - I took the first - I took the first job.

Mr. Nairn: Everybody else has got their referrals already.

...

Ms. Bennington: You can always go back to dispatch. I don't have yours right now.

[As Henderson moved between the dispatch and the referral window, an unidentified man blocked his way.)

Mr. Henderson: ...that was cute.

Unidentified male: No, that was cute, that stunt you pulled right then and... this thing you jumping the books, that was cute.

...

Mr. Henderson: I been on the books for eight months...the constitution says I got as much right to work as you.

Unidentified male: Does your ticket say 357?

Unidentified male: That must be the way they do it in his own home local. Is that the way they do it in your local?

[Mr. Henderson leaned against the wall next to the referral window where Bennington stood looking at him.]

Unidentified male: My constitution says soon as you get out that door I could whip your ass.

...

Unidentified male: Well, my constitution says, as soon as you get out there, whuppin' your ass. That's what the constitution says.

Mr. Avera: That's f____ up. Don't know how it works. Don't care how it works. That's the way it works in his local...When you don't work in your own home local, then you got to go somewhere else, that's all. You don't go into somebody else's local, start jumping the books.

Mr. Snow: 500 brothers out of work...I'm glad I met you, Brian...I'll remember that name.

Mr. Avera: Everybody will remember that name.

Unidentified male: Yeah, don't speak to No. 41. You're gonna catch hell.

...

Unidentified voice: Gonna give you a hard time.

...

Unidentified male: ...you're gonna get a lot of headaches out of it.

Unidentified male: He'll get paid - he'll get paid now but - get paid later.

Large noticed a "commotion was going on" concerning Henderson, but he said he had a job to do, which he would not interrupt. Large testified it was common for people to get into arguments about various subjects in the hiring hall but gave no details of any arguments. Juanita Kerrick, a traveler working out of Local 357's hiring hall since 1995, who was called as a witness by Respondent, testified she could not recall ever seeing an argument among workers awaiting calls in the hiring hall. Her testimony does not contradict that of Cieklinski or Henderson, as there is no evidence she was present at the hiring hall on March 7, May 16, May 23 or September 15. Her testimony does, however, provide evidence that arguments or "commotions" at the hiring hall were unusual, which contradicts Large's assertion that arguments were routine. I do not, therefore, accept his testimony in this regard.

Shortly thereafter, Egge told Bellard that a "book jumper" would be reporting to the jobsite. Egge asked Bellard if he could "spin" the book jumper (deny the referred worker employment when the worker reported to the jobsite). Bellard said he would have to speak to Newtron's general manager. Egge said if the company did not do it there would be problems at the jobsite. When Bellard asked what he meant Egge said, "Well you know, wires being cut or people not showing up for work, or concrete being poured down pipes. It might not be from us; there's other union contractors out there on this job, you know. I'm not saying it's going to be us." Bellard said he would speak to his boss.[13]

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[13] Egge denied having any such conversation with Bellard. I credit the testimony of Bellard, whom I found to be forthright and sincere. Egge admitted the Local 357 workers on the Big Horn job did not like Henderson's accepting the job.

Bellard reported his conversation with Egge to Lee Byrd (Byrd), Newtron's general manager. Byrd told Bellard to contact the hiring hall and get their input; he wanted to know whether Respondent would back up Newtron if they spun the worker, or would Respondent later file a grievance for him. Bellard telephoned Westover, told him Egge had said a book jumper was being dispatched to the job, and asked Westover what he wanted to do about it.

Mr. Westover said the company should do the right thing, that he wasn't happy with book jumpers. Westover told Bellard if he did the right thing, "there could be a ticket down the for you." Bellard understood this reference to a ticket to mean that he might be permitted to switch his union membership from his home local in Louisiana to Local 357, which Westover knew he wanted to do.[14/]

Bellard asked if Respondent would represent workers the company spun. Westover said he could not guarantee Respondent would not give them representation. Bellard said, "If you can't guarantee that, then I can't guarantee that I can go along with what you want me to do."[15/]

When pursuant to Newtron's requested dispatch Henderson reported to the Big Horn jobsite, Bellard hired him. Within the first week of his hire, Egge asked to speak with Bellard. He said he did not like having Henderson on the job, that nobody else liked having a book jumper on the payroll. Later, Bellard complained to Egge that the work was slowing down and asked him what the problem was. Egge told Bellard that if Newtron got rid of the "traveler" more work would get

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[14] While Bellard was unclear about when the conversation occurred he remembered it was about a week prior to the day Henderson reported to the jobsite in response to the dispatch request. As Henderson was hired May 18, the conversations must have occurred in mid-May.

[15] Westover denied having any such conversation with Bellard. I specifically discredit Westover's denial and accept Bellard's account.

done faster.[16/] On another occasion Bellard sought to assign overtime work on the jobsite. Egge refused to work overtime and told Bellard he would discourage other Local 357 members on the jobsite from working overtime if Newtron let Henderson do any overtime. Out of concern that it would impede work on the jobsite, Bellard never assigned overtime work to Henderson.

Shortly before May 23 Newtron placed another request for an electrical worker with Respondent. Cieklinski went to the hiring hall on May 23, intending to accept dispatch to Newtron.[17/] Henderson and Nairn also returned to the Hiring Hall to witness Cieklinski accept the dispatch. When his name was called for dispatch on May 23, Cieklinski did not ask to go on the side, but asked to be dispatched to Newtron. He was directed to report to the job on May 27.

When Cieklinski stepped away from the dispatch window toward the main reception office to get his referral, four or five persons in the room yelled and screamed at him. As he continued walking toward the referral area in main reception office, other persons verbally attacked Henderson and Nairn. Large and another dispatcher watched from the dispatch window. The persons followed Cieklinski into the referral area where Poma and Bennington stood watching.

After witnessing Cieklinski accept a dispatch that morning while standing about 6 to 10 feet from the dispatch window, Henderson taped interchanges between him and Local 357 members under the same circumstances described earlier.

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[16] Bellard testified that several conversations occurred between him and Egge on this subject. He was not clear in assigning specific comments to specific conversations, and I do not find it necessary to do so in order to find the testimony reliable.

[17] Cieklinski was willing to accept a call to construction companies Newtron, Bechtel, or Fisk because he believed those companies would not bow to Respondent pressure and spin him.

While members and/or other persons directed loud and confrontational comments to Henderson, Large and Westover intermittently looked at Henderson from the dispatch window as they walked back and forth in the dispatch office. The exchanges, in pertinent part, are set forth below:

Date and Place of Conversations
Dispatch Room of the Hiring Hall

May 23

Speakers

Mr. Henderson
Ben Grant (Mr. Grant), Local 357 member
Jennifer Zambrano (Ms. Zambrano), Local 357 member
Richard Avena (Mr. Avena), Local 357 member
Ron Kimble (Mr. Kimble), Local 357 member
"First Stop," Local 357 member
"Bear," Local 357 member
Numerous unidentified voices

Conversations

Mr. Grant (to Mr. Henderson): You're a piece of sh_

...

Bear: That goes for me too, okay?... You're a big pile of sh_, that's what you are.

...

Ms. Zambrano: So it doesn't matter, you just screw your brothers and sisters out of jobs?...You want to see my kids over here? Ask them how long I've been out of work. Hey, guys, come here. Kids. Come on, look at my kids... They're here with me because I'm unemployed. And ask them how long I've been out of work.

Mr. Henderson: How long you been out of work?

Ms. Zambrano: Ask them. Look at them. Look at these guys. These are the guys I try to feed each and every week.

Mr. Henderson: ...I live here. I got an out-of-state ticket ... I got a house here. I live here.

Bear: ...Do you have a ticket that says 357 on it?

Mr. Henderson: No, it didn't say 357.

...

[Henderson returned to the referral window. Barryington was there, Poma was moving about in the referral office.]

First Stop: Boy, if you want to play the game out here, you better start getting used to doing it right. Now, g__ d__ it, that's b__sh__.

...

First Stop: You can go back to your home local and work.

Mr. Henderson: I live here, dude.

...

First Stop: Well, good for you. I been here since '95, and I got in the local because I knew that's what you're supposed to do...the way you've done it, you're f___.

...

First Stop: Well, why in the hell did you come here in '96? You wasn't invited, was you? Well then, why don't you go home on your own?

Mr. Henderson: Because this is my home.

First Stop: No, it ain't. We don't want you here. There's going to be a day that you wish to hell you was local. Might think about putting that house up for sale while you can sell it.

Mr. Henderson: Why is that?

First Stop: Well, this economy might just fall and you'll be sitting on your ass with a house. Then you can go home and bitch about how you was treated in 357. Then you'll be sitting out there bitching about all the tramps taking your f____ work.

[Henderson moved to within a few inches of the referral window.]

Mr. Kimble: He's another one that tramped out of here and then came back. Should have stayed on the f____ road.

Mr. Avena: He's a glutton for punishment. Hammers and

knives and he came back for more this week.

Cieklinski received dispatch to report to Newtron on May 27. Before Cieklinski reported to the jobsite, Westover telephoned Bellard and asked him to spin the book jumper who had accepted the dispatch.[18] Bellard said he could not do it. Westover said he was disappointed in Bellard and wanted to know if he was sure about his decision. He said, "I can guarantee you we'll back you up on this one." Bellard said he would talk to Byrd and get back to Westover.

Bellard spoke to Byrd and Allen about his conversation with Westover. Both men said they supported his decision. However, about 2 days later Allen told Bellard he decided not to hire Cieklinski. When Cieklinski reported to the Big Horn jobsite on the following day, Bellard apologized and told him he had to spin him, that it was out of his hands, and he would have to return to the hall and straighten out the problem there.[19] A couple of days after Bellard refused to hire Cieklinski, Egge told Bellard that prior to Cieklinski's reporting to the jobsite, Egge had warned Allen of potential sabotage problems if they hired Cieklinski.[20]

After having been rejected for employment by Newtron, Cieklinski signed Respondent's out-of-work list the following day. Thereafter he did not sign the book again and became ineligible for dispatch a week later, as workers must sign the list each Wednesday to be eligible. Cieklinski was unwilling to sign the list because of what he had gone through.

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[18] Although Bellard could not recall if Cieklinski was named in the conversation it is clear from the circumstances that he was the individual referred to.

[19] This conversation as related by Bellard is substantially corroborated by Cieklinski's tape recording of the exchange.

[20] Some sabotage occurred at the jobsite but investigation failed to identify the instigator(s). Egge admitted having dinner with Allen but denied making any such statement to Bellard. I credit Bellard's testimony.

Although he continued to maintain a residence in Las Vegas, he obtained work in Los Angeles, California as a traveler.[21]

In June Allen told Bellard he couldn't wait to get rid of the other book jumper (Henderson). Two to 3 weeks later Allen told Bellard to lay Henderson off, to make it look legitimate - like they weren't picking on a book jumper, and to choose another worker to lay off also. Bellard thereafter laid off Henderson and Eric Richardson, the last two workers hired, July 3, by falsely telling them work is coming to an end.[22]

After his layoff Henderson again signed the out-of-work list. During July, August and the first half of September, when the union dispatcher called his name, Henderson asked that he be put on the side. On September 15, Henderson and Nairn accepted dispatches to Dyna Electric at the Mandalay Bay jobsite. Afterward, as Henderson stood 5 to 8 feet away from the referral window, various Local 357 members approached him and, similar to the previous incident, berated him about having accepted a call. During the harassment Bennington, occasionally Poma, and once Large, looked on.

After enduring several minutes of Local members' hostile reproaches, Henderson and Nairn left the hiring hall and went into the parking area. There, in a group of about eight people including Local 357 members Gering denounced Henderson , in pertinent part, as follows:

Date and Place of Conversations
Outside the Hiring Hall

September 15

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[21] Respondent asserts that since September 2002, Cieklinski has been ineligible to sign book one because of change of residency. The evidence does not support such a collusion.

[22] Respondent argues Bellard was motivated to testify dishonestly because of a dues dispute he had with Respondent. As noted above, I found Bellard to be a forthright and sincere witness. I credit his testimony.

Speakers

Mr. Henderson
Jennifer Zambrano (Ms. Zambrano), Local 357 member
Eddie Gering (Mr. Gering), Local 357 member, and
chairman, Local 357 Executive Committee
Numerous unidentified voices

Conversations

Mr. Gering: ...This is my f____ local here. Why the f__ don't you go back to North Carol-f____-[ina]?

Mr. Henderson: You better leave me alone.

Mr. Gering: Yeah? And what's going to happen, man? What's going to happen if I f____ sit right here and call you a piece of sh_? What are you going to do about that, huh? The piece of f____ sh_ that you are, m___-f___. What are you going to do about that? You going to sit here and let a little m____-f____ like me call you a f_____ low-life f____ piece of sh_? What the f__ they teach you in North Carolina m___-f___? Huh? What the f__ they teach you there man? To f_____ f__ your brothers?...Coming to this local, f____ taking this work. Huh? We got local people on the books waiting for them f_____ jobs, man.

...

Unidentified male: You can do the right f_____ thing and turn that f_____ call back in. Do the right f_____ thing.

Mr. Gering: Dude, you ain't in North Carolina, man. You're in 357. This sh_'s not acceptable. It may be f___ legal, but it ain't acceptable, dude.

...

Mr. Gering (pointing his finger at Mr. Henderson): Well, he's the scumbag that started this sh_. ... That's why I'm f ___ focusing on you, because you're the scumbag that started this f____ sh_. So what are you gonna do man, huh? What, you gonna beat me up? Is that what you're gonna do?

Mr. Henderson: You're the one doing all the talking,

aren't you?

...

Mr. Gering: ... Don't tell me about it. I know the f___ law. I know the rules, man. There's f____ laws and then there's rules. Rules is: You come here as a guest, you don't f____ come here and take our f____ work. We got people on the book. ... You wait your f____ turn, if it gets to you, and then you take it. You don't f____ jump the book. ... You're a f____ rat; you're a f____ worm; you're a f____ scab.

...

Mr. Gering: You can f___ get in your cars and drive off, but I'll guarantee you it ain't over, man. I'm going to make it my f____ quest.[23]

Unidentified male: There's water waiting for you at Mandalay...we'll get the word out.

Ms. Zambrano (who had been talking on her cell phone, telling someone Mr. Henderson was going to take the call to the Mandalay Bay job): Don't worry, brother. You're taken care of. Just like you took care of us.

I do not find it necessary to describe further this verbal attack on Henderson. Suffice it to say that with virtually no response from Henderson, Gering, with group support, continued his obscene harangue. Gering admitted to an "unpleasant confrontation" with Henderson about his accepting dispatches although Gering knew it was illegal to impose a rule that travelers go on the side. He was angry with Henderson because he chose "not to abide by traditions and standards of conduct that we impose on ourselves."

Michael David Naddeo (Naddeo), a local 640 traveler out of Phoenix, Arizona, was outside the union hall during the above-described confrontation in the parking lot.

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[23] According to Gering, by that comment he meant he would continue to let Henderson and others know what Henderson was doing wrong.

He saw Large nearby talking to someone in a truck. Naddeo approached Large and spoke to him briefly about a grievance. Then Naddeo looked toward Henderson and the group and said, "Terry, looks like you're going to have another lawsuit on your hands."

Large said, "All I see is some brothers having a disagreement; what goes on in the parking lot is none of my business. Large's denial of this conversation was vague. when asked if he remembered someone pointing out the September parking lot argument to him he answered "Not to any detail." He then testified he talked to two or three hundred people every morning and couldn't remember "Mike coming up and saying anything to me at any given time." As with Large's other denials, I do not find this one credible.

After observing the group's verbal attack on Henderson in the parking lot, Nairn returned to the hiring hall and turned in his job referral to Large. There is no evidence Large inquired what had prompted Nairn's change of mind.[24/]

On October 3, Henderson requested a copy of the side list from Large. Large asked if Henderson had a tape recorder on him. Large refused to give Henderson a copy of the side list, saying he didn't have one, that he had thrown it away.

Henderson did not complain of any of the local members' conduct and harassment to any of Respondent's officials or agents because he felt there was no point in complaining to people who "sicked [sic] [the local members] on us."

V. DISCUSSION

A. Agency status of Egge and Gering

Section 2(13) of the Act provides:

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[24] After September 15, Nairn did not accept any dispatch until November 17 when he was referred to a Bechtel jobsite without incident. Working at the jobsite requires a daily 4-hour round-trip bus ride, which supports an inference that it was not a sought-after job.

> In determining whether any person is acting as an "agent" of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

It is well established that, under Section 2(13) of the Act, employers and unions are responsible for acts of their agents in accordance with ordinary common-law rules of agency. *Town & Country Supermarkets*, 340 NLRB No. 172 (2004), citing *Longshoremen ILA (Coastal Stevedoring)*, 313 NLRB 412, 415 (1995), cert. denied 516 U.S. 1158 (1996). The Board also noted, "When applied to labor relations...agency principles must be broadly construed in light of legislative policies embedded in the Act." *Longshoremen ILA*, *supra*, stating at 417, "Courts have concluded that under the NLRA, agency principles must be expansively construed, including when union responsibility questions are presented [citations omitted]." The Board adopts a concept of apparent authority and, when determining whether it has been created, notes (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe the extent of the authority granted to the agent encompasses the contemplated activity. *Pratt Towers, Inc.*, 338 NLRB 61, 72 (2002).

Egge was Respondent's union steward on the Big Horn job site when he asked Bellard to spin Henderson and threatened retaliation if he didn't. As union steward, Egge discussed employee complaints, and safety and pay issues with the job-site supervisor, had authority to write and resolve grievances and served as liason between Respondent and that jobsite. I find he had apparent authority to act on behalf of Respondent during his conversations with Bellard even if he lacked actual authority. Later Westover, an admitted agent of Respondent, reinforced Egge's apparent authority; when Mr Bellard asked Westover what he wanted to do about the prospective book jumper Westover implicitly espoused Egge's appeals and threats by encouraging Bellard to do the "right thing" and by promising him personal benefit if he did so. Accordingly, I

find Respondent gave Newtron a reasonable basis for believing that Egge had apparent authority to make the requests and threats herein. *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 447 (1991).

At the time Gering verbally assaulted Henderson on September 15 he was in a brief hiatus from his position as union organizer but was still chairperson of Respondent's executive committee. Local 357 members contacted him with concerns about travelers accepting referrals instead of going on the side because, in Gering's view, they knew he held a position with Respondent. There is no evidence Gering disavowed authority or ability to deal with concerns of members who called him. Moreover Gering conducted his verbal assault in view of Large, a circumstance demonstrating to all who saw it that Respondent had cloaked him with authority to engage in the conduct. Ibid. I find Gering was Respondent's agent when he harangued Henderson on September 15.

B. Respondent's 8(b)(1)(A) and 8(b)(2) Conduct

Union-operated exclusive hiring halls are permissible employment systems if lawfully memorialized in collective-bargaining agreements. Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). In operating hiring halls unions must follow clear and unambiguous standards set out in a collective bargaining agreement. Further,

A union that operates a hiring hall must represent all individuals seeking to utilize the hall in a fair and impartial manner. In this regard the Board has held that notwithstanding the absence of specific discriminatory intent, "any departure from established exclusive hiring hall procedures which result in a denial of employment to an applicant...inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users and violates Section 8(b)(1)(A) and (b)(2)," absent demonstration of a legitimate justification. Cell-Crete Corp., 288 NLRB 262, 264 (1988).

A union operating an exclusive hiring hall may not discriminate with respect to registration and referrals on the basis of membership or nonmembership in the union. Electrical Workers Local 3 (White Plains), 331 NLRB 1498 (2000). As stated by the Board:

> The operation of a union hiring hall imposes considerable responsibility on the union agents in charge of the hall. Thus, they must neither foster nor countenance discrimination with regard to access to, or referral from the hall on the basis of International union membership, local union membership, or any other arbitrary, invidious or irrelevant considerations [citations omitted]. Sachs Electric Co., 248 NLRB 669, 670 (1980) [enfd. in part sub nom. NLRB v. Elect. Wkrs. Local 453, 668 F.2d 991 (8th Cir. 1982).

Section 8(b)(2) of the Act provides that it is an unfair labor practice for organizations "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" of the Act, i.e., "in regard to hire or tenure, or term, or condition of employment to encourage or discourage membership in any labor organization."

The General Counsel contends that since March 1, Respondent has independently violated Section 8(b)(1)(A) of the Act by the following conduct:

1. Since March 1, maintaining at its hiring hall the side list practice and procedure whereby travelers surrendered employment referral opportunities to permit dispatch of Local 357 members and applying said side list practice to Cieklinski, Henderson, Nairn, and other travelers.
2. On March 7, threatening travelers with denial of membership in Local 357 and consequent loss of job opportunities because they refused to surrender job referrals to local members.
3. On March 7, May 16, May 23, and September 15, restraining and coercing travelers into surrendering job ref-

errals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of Local 357 who threatened bodily harm and disparaged travelers who accepted job referrals.

4. On October 3, failing and refusing to provide travelers with requested copies of the side list.

The General Counsel also contends that since March 1, Respondent has violated Section 8(b)(2) and 8(b)(1)(A) of the Act by the following conduct:

1. On May 18, requesting Newtron to refuse to hire Mr. Henderson and in late May requesting Newtron to discharge mr. Henderson, thereby causing or attempting to cause Newtron to refuse to hire and to discharge Mr. Henderson.

2. On May 21, requesting Newtron to refuse to hire Mr. Cieklinski, thereby causing or attempting to cause Newtron to refuse to hire Mr. Cieklinski.

The evidence is persuasive, indeed compelling, that Respondent was at all relevant times aware that its longstanding hiring hall side-list practice was maintained and perpetuated through pressure exerted overtly by Local 357 members and covertly by Respondent. Members and Respondent's agents alike referred pejoratively to travelers who did not abide by the side-list practice as "book jumpers." Not only was Respondent aware of its members' hostility to book jumpers, Respondent's agents supported and even fostered the side-list practice. On March 7, when Cieklinski told Westover he would have to eschew the side-list practice that day and take a job, Westover failed to affirm his legal and contractual right to do so. Rather, Westover warned him of disadvantageous ramifications, including inability to obtain Local 357 membership. Even Westover's wishing Cieklinski luck in jumping the book was, in the circumstances, a non-too-subtle message that Respondent would not support his

action. When, shortly thereafter, Cieklinski accepted the job referral to which he was entitled, the dispatcher, Large, expressed his surprise and asked if Cieklinski was sure he wanted to do it. I cannot accept Respondent's assertion that Large's comment simply denoted surprise that Cieklinski was changing his usual custom of side-listing his name. Rather, I conclude that Large's reaction was yet another unsubtle message of nonsupport, immediately reinforced by Large's unfounded threat that the job would only last 41 houra.

Immediately after Cieklinski accepted the job referral and while within close proximity to the office window from which Large and Westover could oversee the hall, Local 357 members subjected Cieklinski to name-calling and threats of physical retaliation if he did not revoke his referral. Credible testimony established that such confrontations were atypical, and it is reasonable to infer that Respondent's officials would have at least inquired into the cause of the angry disruption unless they approved it. There is no other reasonable explanation of their nonintervention and their complacent acceptance of Cieklinski's subsequent job referral revocation. Indeed, Westover and Large implicitly evinced their approbation of the harassment and tacitly encouraged it by accepting without question or comment Cieklinski's return of the referral for Local 357 membership benefit. Cieklinski and later Henderson's failure to complain to the Local 357 representatives about what had occurred does not change this conclusion. Under all the circumstances, including the inaction of the referral appeals committee, it was demonstrably futile for any of the travelers to complain. See Iron Workers Local 433 (Steel Fabrication Assn.), 341 NLRB No. 68, at slip op. 4 (2004).

Respondent contends that no union representative heard threats to and harassment of Cieklinski or Henderson, implicitly claiming not only uninvolvement in but also ignorance of any coercion. Respondent's claims are so disingenuous as to approach mendacity. Tilmont had discussed Cieklinski's complaints with Respondent's business

manager Jones. Cieklinski had complained to IBEW district officers about the situation and had taken his complaint to a hearing before the referral appeals committee, over which Respondent's president presided. Local 357 members regularly raised the issue of travelers refusing to go on the side in union meetings, and there is no evidence that Respondent's officials explained the travelers' legal right to do so or attempted in any way to restrain union members' disapprobation. Moreover, Respondent directly solicited Newtron to refuse to hire Henderson and Cieklinski because they had flouted the side-list procedure. As to Respondent's contention that it was oblivious of the hiring hall harassment of Cieklinski and Henderson, the argument lacks credibility. While union representatives present in the hall during the harassment probably did not hear all the exchanges, tape-recording clarity, supporting testimony, and other circumstances set forth herein make it reasonably certain they heard enough to know what was going on, but did nothing to stop it.

When Henderson legally accepted a dispatch on May 16, Respondent again turned a blind eye to the resulting and outrageously abusive uproar among its members and other job applicants who openly verbally attacked and threatened Henderson. While Large could not deny the incident occurred, he minimized it by calling it a "commotion" he could not be bothered to deal with. When Local 357 members and other job applicants directed similar and volubly open vilification at Cieklinski and Henderson on May 23, Respondent's agents again remained deliberately oblivious to what they could not possibly have failed to observe.

On September 15, Local 357 membership again directed threats and hostility toward Henderson and Nairn for accepting dispatches in the most bullying and intimidating display of animosity yet. This time Respondent's agent, Gering, spearheaded the attacks. Even assuming Respondent should not be held directly accountable for the threats and

intimidation, credible evidence establishes that Large was fully aware of Gering's conduct on that occasion and deliberately ignored it, saying, "All I see is some brothers having a disagreement; what goes on in the parking lot is none of my business." Apparently, Respondent viewed what had gone on in the hall itself on that and previous occasions as equally beyond its responsibility. When, on September 15, after enduring threats and hostility, Nairn surrendered his job referral, no dispatching official asked why he had done so, investigated the circumstances, or took any action whatsoever to restrain the hostile tactics of the hiring hall denizens.

Respondent contends that it cannot be held liable for coercive conduct unless committed by the labor organization or its agents. I cannot agree. Even aside from the September 15 conduct of Gering, Respondent's agent, Respondent must bear responsibility for conduct acquiesced in and condoned by its representatives, which takes no steps to disavow. See *Laborers' Local 616 (Bruce & Merrilees Electric Co.)*, 302 NLRB 841 (1991); Dover Corp., 211 NLRB 955, 957 (1974) enfd. 535 F.2d 1205 (10th Cir. 1976). Respondent's ongoing and frequently demonstrated indifference and inaction toward the hiring hall applicants' harassment of disobliging travelers are not only inconsistent with its duty to represent all hiring hall applicants fairly and impartially, they are convincing evidence of its acquiescence in and approval of the conduct. Moreover, evidence doesn't support any argument Respondent's actions or inactions in this matter resulted from mere negligence or inadvertent mistake so as to preclude liability.[25] Rather, Respondent's conduct fits within those descriptive terms the Board uses to describe breaches of a union's duty to exercise authority over referrals in a nonarbitrary and nondiscriminatory fashion:

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[25] See *Plumbers' Local 342 (Contra Costa Electric)* 329 NLRB 688 (1999), revd. sub nom. *Jacoby v. NLRB*, 233 F. 3d 611 (D.C. Cir. 2000).

'[A]rbitrary,' invidious,' 'discriminatory,' 'hostile,' 'unreasonable, 'capricious," irrelevant or unfair considerations without 'honesty of purpose' [all of which] indicate deliberate conduct intended to harm or disadvantage hiring hall applicants. They all imply unions either use their power to control referrals against the interests of applicants, or may do so at any time, at their discretion. *Plumbers Local 342 (Contra Costa Electric, Inc.)*, 336 NLRB 549, 551 [(2001), aff'd sub nom. *Jacoby v. NLRB*, 325 F.3d (D.C. Cir. 2003)], quoting *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989).

Respondent also contends it is not responsible for the conduct of nonrepresentatives because it published an antiharassment policy and because Cieklinski, Henderson and Nairn did not follow the relief provisions in that policy. Respondent further argues that the three men did not exhaust available internal union remedies. While it is true the three travelers did not follow the specific procedures envisioned by the antiharassment policy or file internal union charges against union members who harassed them, the evidence is clear that such would have been acts of futility. Respondent was well aware of the harassment. Respondent had already ignored an oppotunity to address the problem when Cieklinski sought and obtained a hearing before the appeals committee regarding the integrity of the referral procedure. Following that hearing, Respondent not only took no action, but by its subsequent decision denied there was a problem, asserting the committee had found no violation of the inside construction agreement. After the committee's decision and Respondent's open, deliberate disregard of the harassment, protesting travelers were justified in believing it useless to seek Respondent's help.

By its conscious and willful refusal to acknowledge or investigate its members and others conduct or take steps to control it Respondent restrained and coerced travelers into surrendering job referrals to Local 357 members and participated in, acquiesced in and failed to take any action against Local

357 members or others who threatened bodily harm and disparaged travelers who accepted job referrals, in violation of Section 8(b)(1)(A) of the Act. While specific evidence of travelers being deterred from accepting job referrals by Respondent's unlawful conduct was presented only on Cieklinski, Henderson and Nairn, it is reasonable to conclude that other travelers were similarly deterred.

Credible evidence also establishes Respondent's agents actively sought to prevent Newtron's employment of Cieklinski and Henderson. On or about May 16, *via* Egge and Westover Respondent unsuccessfully attempted to make Newtron refuse to hire - that is to discriminate against - Henderson by asking Bellard to spin Henderson and threatening consequences if he did not. Respondent's lack of success makes its efforts no less a violation of Section 8(b)2. On May 23, through the same two agents, Respondent successfully caused Newtron to hire, or to spin, Cieklinski. In both situations Respondent was motivated by its animosity toward the two travelers for having lawfully accepted dispatch before all Local 357 members on book one had been dispatched. Respondent's conduct in both instances violated Section 8(b)(2) of the Act.

The General Counsel argues that Respondent caused Newtron to lay off Henderson. While there is no direct evidence that any agent of Respondent requested Henderson's layoff, evidence does establish that Respondent made it abundantly clear it did not want Henderson on the job. Egge threatened that jobsite sabotage might follow Henderson's employment, and when Bellard later complained of work slowdown, Egge said if Newtron got rid of Henderson, more work would get done faster. Egge also told Bellard that employees would refuse to work overtime if Respondent assigned it to Henderson In these circumstances Allen's direction to Bellard to lay off Henderson and to lay off another employee to make it look legitimate was as instigated by Respondent as if Respondent had directly demanded the action. Accordingly, I find Respondent attempted to, and did cause Newtron to lay off Henderson in violation of Section 8(b)(1)(A) and (2) of the Act.

The complaint further alleges that Respondent refused to provide Cieklinski with a copy of the side list when he requested it on October 3 in violation of Section 8(b)(1)(A) of the Act. Board law is clear that hiring hall records must be shown to hiring hall users on request. Bartenders & Beverage Dispensers Local 165 (Nevada Resort Assn.), 261 NLRB 420 (1982). Although not as formally constituted or maintained as dispatch and referral records, it is clear Respondent kept a daily side list on which to document the names of travelers or other individuals who wish to defer dispatch. Such a list is a hiring hall record Respondent is obligated to furnish to users upon request. While Large denied any list existed that he could produce to Cieklinski, I did not find him a reliable witness, and I do not accept his assertion that no side list existed on October 3. Accordingly, I find that in not disclosing its side list to Cieklinski on October 3 the union violated Section 8(b)(1)(A) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Newtron Heat Trace, Inc. is and has been at all times material an employer engaged within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent is and has been at all relevant times a labor organization within the meaning of Section (2)(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act by

(a) Maintaining at its hiring hall a side-list practice and procedure whereby travelers surrendered employment referral opportunities to permit dispatch of Local 357 members, and applying said side-list practice to Cieklinski, Henderson, Nairn, and other travelers.

(b) Threatening travelers with denial of membership in Local 357 and loss of job opportunities because they refused to surrender job referrals to local members.

(c) Restraining and coercing travelers into surrendering job referrals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of

Local 357 or other individuals who threatened bodily harm and disparaged travelers who accepted job referrals.

(d) Failing and refusing to provide Cieklinski with requested copies of the side list.

4. Respondent violated Section 8(b)(2) and 8(b)(1)(A) of the Act by

(a) Requesting Newtron to refuse to hire Henderson and attempting to cause and causing Newtron to lay off Henderson, in violation of Section 8(a)(3) of the Act.

(b) Requesting Newtron to refuse to hire Cieklinski, thereby attempting to cause and causing Newtron to refuse to hire Cieklinski in violation of Section 8(a)(3) of the Act.

REMEDY

Having found respondent has engaged in certain unfair labor practices, I shall recommend it to be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act including the posting of a remedial notice.

I will also direct Respondent to make Michael J Cieklinski, Richard Brian Henderson, Al Nairn and other travelers affected by Respondent's unlawful conduct whole, with interest, for any loss of job opportunity caused by Respondent's violations of Section 8(b)(1)(A) and 8(b)(2) of the Act as found herein.[26/] Such make whole remedy shall include payment to Cieklinski, Henderson, Nairn and other affected travelers and to the contractual fringe trusts for all loss of wages and

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[26] Respondent objects to so broad a remedy, contending the evidence does not support a conclusion that travelers are coerced to go on the side list. As explained earlier, the evidence shows pervasive, albeit usually tacit coercion condoned and acquiesced in by Respondent. Therefore, the remedy is appropriate. Determining identities and job opportunity losses of and giving notification to such travelers as may have been coerced is left to the compliance stage of this matter.

benefits and contractual fringe benefits, plus appropriate late trust payment penalties as provided for by the collective-bargaining agreement that would have been paid for employment lost as a result of Respondent's unfair labor practices.

Backpay shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for Retarded*, 283 NLRB 1173 (1987). Contractual payments shall be made consistent with *Merryweather Optical Co.*, 224 NLRB 1213 (1976).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The respondent, International Brotherhood of Electrical Workers Local 357, AFL-CIO, its officers, agents and representatives, shall

1. Cease and desist from

(a) Maintaining at its hiring hall a side-list practice and procedure whereby travelers surrender employment referral opportunities to permit dispatch of Local 357 members and applying said side-list practice to Cieklinski, Henderson, Nairn and other travelers.

(b) threatening travelers with denial of membership is Local 357 and loss of job opportunities because they refuse to surrender job referrals to local members.

(c) Restraining and coercing travelers into surrendering job referrals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of Local 357 who threaten bodily harm and disparage travelers who accept job referrals.

(d) Failing and refusing to provide access to and a right to

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[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in sec. 102,48 of the Rules, be adopted by the board and all objections to them shall be deemed waived for all purposes.

inspect and copy hiring hall books and records, including any side list, which are necessary to determine the requesting individual's position or priority of dispatch within the referral system and to further determine whether the referral process is being operated properly.

(e) Requesting Newtron heat Trace, Inc. or any other employer to refuse to hire travelers or any other hiring hall applicant in violation of Section 8(a)(3) of the Act.

(f) Causing or attempting to cause Newtron Heat Trace, Inc. or any other employer to refuse to hire or to lay off or otherwise terminate travelers or any other hiring hall applicant in violation of Section 8(a)(3) of the Act.

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and enforce its established hiring hall practices and procedures in a manner that neither requires nor encourages travelers to surrender employment referral opportunities to permit dispatch of Local 357 members.

(b) Make Michael J. Cieklinski, Richard Brian Henderson, Al Nairn and any other affected travelers whole, plus interest for any loss of earnings and other benefits suffered by them as a result of Respondent's unlawful conduct, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records in the possession of Respondent including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its hiring hall in Las Vegas, Nevada copies of the attached notice marked "Appendix."[28/] Copies of the notice, on forms provided by the Regional Director for Region 28, after being

signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings Respondent shall duplicate and mail, at its own expense, a copy of the notice to all of its current and former employees at any time since March 7, 2003.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Newtron Heat Trace, Inc. and other appropriate employers, if willing, at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, at San Francisco, CA June 15, 2004.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board found that we violated Federal labor law and ordered us to post and obey this notice

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[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW PROVIDES

Any labor organization that operates a hiring hall or referral process that is an exclusive source of employment referrals to employers must fairly and consistently follow the hiring hall's rules and regulations regarding hiring hall dispatches and must represent all individuals seeking to utilize that hall in a fair and impartial manner.

WE WILL NOT maintain at our hiring hall a side-list practice and procedure whereby individuals who are not members of Local 357 (travelers) surrender employment referral opportunities to permit dispatch of Local 357 members.

WE WILL NOT threaten travelers with denial of membership in Local 357 and loss of job opportunities because they refuse to surrrender job referrals to Local 357 members.

WE WILL NOT restrain and coerce travelers into giving up job referrals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of Local 357 and others who threaten and harass travelers who accept job referrals.

WE WILL NOT in any like or related manner fail and refuse to dispatch hiring hall applicants to jobs to which they are entitled under the lawful hiring hall rules and regulations.

WE WILL NOT upon request by a represented employee or job applicant, fail and refuse to provide access to and a right to inspect our books and records, including any side lists, which are necessary to determine the requesting individual's position or priority of dispatch within the referral system and to further determine whether the referral process is being operated properly.

WE WILL NOT request any employer to refuse to hire travelers or any other job applicant in violation of Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause any employer to refuse to hire or to lay off or otherwise terminate travelers or any other job applicant in violation of Section 8(a)(3) of

the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL maintain and enforce our hiring hall practices and procedures in a manner that neither requires nor encourages travelers or other job applicants to give up employment referral opportunities to permit dispatch of Local 357 members.

WE WILL make Michael J. Cieklinski, Richard Brian Henderson, Al Nairn, and other affected travelers whole, plus interest, for any loss of earnings and other benefits suffered by them as a result of our unlawful actions.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO (NEWTRON HEAT TRACE, INC.)

December 16, 2004

DECISION AND ORDER

BY NLRB CHAIRMAN BATTISTA AND MEMBERS

LIEBMAN AND WALSH

On June 15, 2004, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.

The Make-Whole Provisions for Unidentified Travelers

The judge found, and we agree that the Respondent violated Section 8(b)(1)(A) by restraining and coercing three travelers[3] (members of sister local unions, who seek work in the

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule and administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found and we agree, that the Respondent violated Sec. 8(b)(1)(A) by refusing a hiring hall registrant's request for a copy of the October 3, 2003 side list. However, we

Respondent's jurisdiction) into surrendering job referrals to the Respondent's members. Respondent's coercive conduct, directed at the three travelers, included verbal harassment and threats by groups of union members occurring in a hiring hall and the hiring hall parking lot. This conduct occurred on four dates over a 6-month period starting March 7, 2003.

In fashioning a remedy for Respondent's unlawful conduct, the judge properly directed Respondent to make whole these three travelers whom Respondent coerced into surrendering dispatches. However, the judge also directed the Respondent to make whole "other travelers affected by the Respondent's unlawful conduct." The judge further directed that "[d]etermining the identities and job opportunity losses of and giving notification to such travelers as may have been coerced is left to the compliance state of this matter."

The Respondent excepts to the judge's extension of a make-whole beyond the three identified travelers. As explained below, we find merit to this exception and modify the judge's recommended Order to limit the make-whole remedy to those three identified travelers.

In fashioning its remedial order, the Board generally requir-

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note that the hiring hall registrant who made the request was Richard Brian Henderson, not Cieklinski, as the judge stated.

[2] In her conclusions of law, the judge found the Respondent violated Sec. 8(b)(1)(A) by "[m]aintaining at its hiring hall a side-list practice and procedure whereby travelers surrendered employment referral opportunities to permit dispatch of Local 357 members, and applying said side-list practice to Mr. Cieklinski, Mr. Henderson, Mr. Nairn, and other travelers." We note that the Respondent here maintained its side-list practice in the context of coercive conduct enforcing the practice. We find it unnecessary to reach the issue of whether the Respondent's mere maintenance of its side-list practice would have violated Sec. 8(b)(1)(A) in the absence of coercive conduct enforcing the practice.

[3] Michael Cieklinski, Brian henderson, and Allan Nairn.

es the Respondent to make whole those persons who lose earnings as a result of an unfair labor practice. Where affected persons remain unidentified at the conclusion of the unfair labor practice hearing, the Board sometimes requires the respondent to make them whole, deferring their identification to compliance proceedings. However, the Board will order the respondent to make whole such unidentified persons only where they constituted a "defined and easily identified class." *Electrical Workers Local 48 (Oregon-Columbia NECA)*, 342 NLRB No. 10, slip op. at 9 (2004).[4/]

The judge here required the Respondent to make whole unidentified travelers and deferred identification of these travelers to compliance proceedings. However, the judge did so without addressing the threshold issue of whether the unidentified travelers constituted a "defined and easily identified class." Further, on this record, we find that there is no "defined and easily identified class" sufficient to warrant a broader make-whole order.

In order to be within the defined class entitled to a make-whole remedy for the Respondent's coercive conduct, a traveler had to (1) know of the coercive conduct, (2) decline a referral after learning of the coercive conduct, and (3) be motivated by the coercive conduct. Although the record establishes that the named discriminatees met all three of these requirements, there is no evidence that any other travelers met any of them. Indeed, with regard to whether a traveler's decision to decline a referral was motivated by the coercive conduct, the evidence affirmatively shows that travelers regularly declined referrals in favor of local members even in the absence of coercive conduct. In short, there is no crisp, clean line of demarcation separating the coerced from the

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[4] Accord: *Iron Workers Local 433 (Reynolds Electrical)*, 298 NLRB 35, 36 (1990), enfd. mem. 931 F.2d 897 (9th Cir. 1991); *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100, 1101 (1986), enfd. mem. 865 F.2d 251 (3d Cir. 1988).

uncoerced among the travelers who declined referrals in favor of local members. The fact that the class definition is not a "single, readily ascertainable, and definitive trait" or a "single objective measure" argues against providing a make-whole remedy for the unidentified travelers. *Laborers Local 158 (Contractors of Pennsylvania)* supra, 280 NLRB at 1101.

For these reasons, we find that the unidentified travelers who may have lost job opportunities as a result of the Respondent's coercive conduct do not constitute a "defined and easily identified class." Electrical Workers Local 48 (Oregon-Columbia NECA), supra (granting a make-whole remedy to unidentified persons where they could be identified from several readily identifiable classes of unlawfully preferred registrants - e.g., "salts" - but not to persons who could not be so identified). Accordingly, we will not extend the make-whole remedy to them.

The authorities cited by our dissenting colleague, in which the Board provided a make-whole remedy for unidentified discriminatees, are distinguishable. In both *Sachs Electric Co.*[5] and *Electrical Workers Local 697 (UE&C Catalytic)*,[6] the union was shown to have taken affirmative action, including making directly coercive statements, to impel the travelers employed by a particular employer at a specific worksite to quit their jobs in favor of local union members. Shortly thereafter, *all* of those travelers ceased working for the respective employer, some by quitting, although there was no evidence that travelers had quit voluntarily in the past. Accordingly, each traveler's motive for quitting could reasonably be inferred without relying primarily on credibility findings. Because the unnamed travelers and their termination dates could also be easily identified from the employer's payroll records, the Board provided a make-whole remedy for all those who quit, not just for those identified by name

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[5] 248 NLRB 669 (1980), enfd. in part sub nom. *NLRB v. Electrical Workers Local 453*, 668 F.2d 991 (8th cir. 1982).
[6] 318 NLRB 443 (1995).

in the initial proceeding.[7] In short, the unidentified discriminatees in Sachs and Electrical Workers Local 697 and their make-whole entitlements were "easily identified."

Here, by contrast, determining the identity of the travelers who declined referrals, the dates on which they did so, and the travelers motive in each instance could be significantly more difficult. While Sachs and Electrical Workers Local 697 both involved documented work terminations, this case involves virtually undocumented choices by individuals to "go on the side list" that was kept for travelers at the times when work referrals became available. In this case, moreover, there is no evidence indicating which or even how many travelers acquired knowledge of the Union's coercive conduct; nor has the General Counsel proved that the Respondent's coercive conduct caused any traveler other than the named discriminatees to decline a referral. There is, in fact, strong evidence that travelers had previously declined referrals voluntarily i.e., for reasons unrelated to unlawful coercion. It appears that there is no documentary evidence, however, to establish in the compliance proceeding any of the elements required for make-whole relief here, and the only evidence would be the travelers' own self-interested testimony.[8]

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[7] In *Sachs Electric Co.* 32 travelers worked for the employer; some of these travelers quit as a result to the union's coercive conduct and the remainder were lawfully laid off by the employer. The Board provided a make-whole remedy for the travelers (including two identified travelers) who quit, deferring to compliance the determination of which travelers quit and which were laid off. In *Electrical Workers Local 697 (UE & C Catalytic)*, all of the travelers who worked for the employer were shown to have quit as a result of the union's coercive conduct, and the Board provided a make-whole remedy for them all.

[8] The dissent notes that the Respondent's hiring hall records show the dates that the dispatcher called a traveler's name for referral and whether the traveler accepted a referral. Ho-

Determining whether or when a traveler quit because of the Respondent's misconduct would therefore pose difficult credibility issues.[9/]

The cases cited by our dissenting colleague in support of his argument that the Board has granted a make-whole remedy to additional unidentified discriminatees even where there were potentially many such persons and there was no simple way to identify all of them, are similarly distinguishable. In both *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995), enfd. mem. 139 F.3d 906 (9th Cir. 1998), and in *Plumbers Local 198 (Jacobs/Wiese)*, 268 NLRB 1312 (1984), enfd. 747 F.2d 326 (5th Cir. 1984), the widespread discrimination that was established did not involve the undocumented observance of a stand-aside custom, but discriminatees' initial eligibility for the union's written, first-priority referral list and the union's deliberate failure to inform all discriminatees of the applicable rules and other information. In both cases therefore, the union's broad discrimination against unidentified travelers and nonmembers was established, and there was sufficient documentary evidence to determine make-whole entitlements. In *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1060 (1985), reconsideration denied, 283 NLRB 779 (1987), which involved

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wever, the evidence strongly suggests that those records would not show *why* a traveler did not accept a particular referral - e.g., the traveler might not have been present in the hiring hall when his name was called, or he might have been going on the customary "side list" voluntarily.

[9] In Electrical Workers Local 697 (UE & C Catalytic), the judge noted testimony that there was an "unwritten rule" or "tradition" that travelers would quit in favor of local union members. 318 NLRB at 444. The judge also noted - and explicitly discredited - the testimony of two travelers that quit voluntarily. 318 NLRB at 447. However, there is no indication that any of the travelers involved in that case had themselves previously quit a job in favor of local union members.

actual referrals, not only was widespread discrimination in favor of senior members established, but it was specifically confirmed that discriminatees had applied for work in writing and that that evidence was in the Respondent's possession. Although the determination of entitlement to a make-whole remedy in these cases might have been difficult in the sense of requiring an intensive review of hiring hall records, that determination did not depend, as it would here, primarily on determining a putative discriminatee's state of mind by assessment of the credibility of self-interested witnesses.

Our colleague suggests we are holding that a make-whole remedy may properly be ordered for unnamed discriminatees only where such individuals may be identified through documentary evidence. We are not so holding. Although documentary evidence is certainly preferable, we do not foreclose the possibility, in some future case, of extending relief to unnamed persons to be identified by testimony concerning straightforward matters of objective fact. Such testimony would at least be capable of corroboration by other witnesses. Here, by contrast, the testimony necessary to identify unnamed class members would concern a wholly subjective state of mind. We decline to find such a class "defined and easily identified."

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 357, AFL-CIO, Las Vegas, Nevada, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining at its hiring hall a side-list practice and procedure in a manner whereby travelers are coerced to surrender employment referral opportunities to permit dispatch of Local 357 members and coercively applying said side-list practice to Michael J. Ciekliniski, Richard Brian Henderson, Allan Nairn, and other travelers.

(b) Threatening travelers with denial of membership in Local 357 and loss of job opportunities because they refuse to surrender job referrals to local members.

(c) Restraining and coercing travelers into surrendering job referrals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of Local 357 who threaten bodily harm and disparage travelers who accept job referrals.

(d) Failing and refusing to provide access to and a right to inspect and copy hiring hall books and records, including any side lists, which are necessary to determine the requesting individual's position or priority of dispatch within the referral system and to further determine whether the referral process is being operated properly.

(e) Requesting Newtron Heat Trace, Inc. or any other employer to refuse to hire travelers or any other hiring hall applicant in violation of Section 8(a)(3) of the Act.

(f) Causing or attempting to cause Newtron Heat Trace,Inc. or any other employer to refuse to hire or to lay off or otherwise terminate travelers or any other hiring hall applicant in violation of Section 8(a)(3) of the Act.

(g) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and enforce its established hiring hall practices and procedures in a manner that does not coerce travelers to surrender employment referral opportunities to permit dispatch of Local 357 members.

(b) Make Michael J. Cieklinski, Richard Brian Henderson, Al Nairn whole, plus interest for any loss of earnings and other benefits suffered by them as a result of Respondent's unlawful conduct, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause

shown, provide at a reasonable place designated by the Board or its agents, all records in the possession of the Respondent including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its hiring hall in Las Vegas, Nevada copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Newtron Heat Trace, Inc. and other appropriate employers, if willing, at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 16, 2004.

Wilma B. Liebman, Member

Dennis P. Walsh Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] If this Order is enforced by a judgment of a United States court of appeals, words in a notice reading "Posted by Order of a National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

CHAIRMAN BATTISTA, dissenting in part.

For the reasons set forth below, I disagree with my colleagues' conclusion that the unidentified travelers who lost job opportunities as a result of the Respondent's coercive conduct are not a "defined and easily identifiable class," entitled to remedial relief. In a long line of cases, the Board has provided broad make-whole remedies to remedy myriad violations against travelers.[1/] This case is yet another example of unlawful discrimination against a class of employees. And the class is readily "defined and easily identifiable"; travelers who declined referrals because of the Respondent's unlawful coercion of travelers who were attempting to secure jobs through its referral system. Given the importance that the Board places on removing the effects of an adjudged unfair labor practice, the Board provides a make-whole remedy for unidentified persons adversely affected by this conduct, rather than allowing the wrongdoers to avoid the consequences of their actions.

My colleagues have themselves set forth the well-identified category of employees who would fall within the ambit of a remedy. The General Counsel, who would bear the burden of proof, can easily identify those employees in a compliance proceeding. That is, the General Counsel would call witnes-

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[1] Interestingly, the cases involve sister locals of the Respondent. See, e.g., *Electrical Workers Local 697 (UE & C Catalytic)*, 318 NLRB 443 (1995); *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995), enfd. mem. 139 F.3d 906 (9th Cir. 1998); *Fischbach/Lord Co.*, 270 NLRB 856 (1984), enfd. in part sub nom. *NLRB v. Electrical Workers Local 112*, 827 F.2d 530 (9th Cir. 1987); *Electrical Workers Local 173 (Duncan Electric)*, 269 NLRB 691 (1984), enfd. 760 F.2d 714 (6th Cir. 1985); *Electrical Workers Local 441 (Bear State Electric)*, 269 NLRB 664 (1984); *Sachs Electric Co.*, 248 NLRB 669 (1980), enfd. in part sub nom. *NLRB v. Electrical Workers Local 453*, 668 F.2d 991 (8th Cir. 1982).

ses who would testify that (1) they knew of the Union's conduct; (2) they declined referrals after learning of such conduct; and (3) they declined because of that conduct.

These matters are straightforward. As to the first, the employees would testify, on direct and cross-examination, as to when, where, and from whom such knowledge was acquired. As to the second, the employees would testify as to the declination. The Respondent could challenge that testimony with contrary evidence, including testimony by the Respondent officials who operated the hiring hall as well as hiring hall records showing the dates that the dispatcher called a traveler's name for referral and whether the traveler accepted a referral.

My colleagues say that the Respondent's hiring hall records may not contain sufficient information to ascertain whether the traveler was present in the hall when his name was called. Assuming arguendo that the hiring hall records do not in fact resolve this issue, other evidence (e.g., testimony) can do so. In short, the problem is not an insuperable one.

My colleagues complain that there is no evidence that other employees declined referrals because of the Respondent Union's conduct. The difference between my colleagues and me is that I would hear such evidence, and my colleagues would foreclose it.

My colleagues also suggest that the proof can only be documentary. That is, mere testimony would involve credibility resolutions and will not suffice. Again, there is no case precedent cited for such a rule, and I believe there is none. Administrative law judges make credibility determinations all the time. There is no reason why it cannot be done here.[2/]

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[2] My colleagues say that, "in a future case," testimony might be permitted. There is no reason why that could not be true here. And, testimony concerning motive is not "wholly subj-ective." As in any other case involving motive (e.g. 8(a)(3) cases, testimony concerning motive is usually accompanied by objective facts.

Concededly, the third matter involves the employee's motive for declining. However, the Board's judges frequently make "motive" findings concerning actions. Indeed, those findings are rarely reversed.

My position is consistent with Board precedent. In Sachs Electric, Co.,[3] and in Electrical Workers Local 697 (U.E. & C Catalytic),[4] a union committed unfair labor practices that were analogous to the Respondent's unlawful conduct here and the Board provided a make-whole remedy for all the adversely-affected travelers, not merely those who were identified in the original proceeding. In these cases, travelers were working while local union members were unemployed. The union made unlawful coercive statements to travelers that caused the travelers to quit their jobs in favor of local union members. The Board provided a make-whole remedy for all the travelers who quit their jobs in favor of local union members, not for just the travelers who were identified in the original proceeding.

In light of that precedent, the Board here should provide a make-whole remedy for travelers who declined referrals because of the Respondent's coercive conduct. The remedy should not be limited to the three travelers who were identified in the original proceeding as the immediate focus of the coercive conduct.

Furthermore, the Board has provided a make-whole remedy for unidentified adversely affected persons in cases even where there were potentially many such persons. See *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, supra, 318 NLRB at 142-143 (union unlawfully denied travelers book 1 eligibility by enforcing discriminatory rules and by failing to notify travelers of hiring hall rules over multiyear period); *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1060 (1985), reconsideration denied 283 NLRB 779 (1987) (union, in selecting from among over 100 hiring hall

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[3] Supra, 248 NLRB at 670-671.

[4] Supra, 318 NLRB at 447.

registrants to fill 25 jobs, failed to follow objective referral criteria resulting in unlawful referral preferences for senior members personally known to union officials); Plumbers Local 198 (Jacobs/Wiese), 268 NLRB 1312 (1984), enfd. 747 F.2d 326 (5th Cir. 1984) (unioni used separate out-of-work registers and more onerous sign-in requirements to unlawfully discriminate against 100 travelers in referrals).

Accordingly, I would affirm the judge's recommended Order providing a make-whole remedy for all travelers who lost job opportunities as a result of the Respondent's coercive conduct and deferring to compliance proceedings issues related to which, if any, travelers are entitled to be made whole.

Dated, Washington, D.C. December 16, 2004.

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Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated
Federal labor law and ordered us to post and obey this notice

FEDERAL LAW PROVIDES

Any labor organization that operates a hiring hall or referral process that is an exclusive source of employment referrals to employers must fairly and consistenly follow the

hiring hall's rules and regulations regarding hiring hall dispatches and must represent all individuals seeking to utilize that hall in a fair and impartial manner.

WE WILL NOT maintain at our hiring hall a side-list practice and procedure whereby individuals who are not members of Local 357 (travelers) surrender employment referral opportunities to permit dispatch of Local 357 members.

WE WILL NOT threaten travelers with denial of membership in Local 357 and loss of job opportunities because they refuse to surrender job referrals to Local 357 members.

WE WILL NOT restrain and coerce travelers into giving up job referrals to members of Local 357 by participating in, acquiescing in, or failing to take any action against members of Local 357 and others who threaten and harass travelers who accept job referrals.

WE WILL NOT in any like or related manner fail and refuse to dispatch hiring hall applicants to jobs to which they are entitled under lawful hiring hall rules and regulations.

WE WILL NOT upon request by a represented employee or job applicant, fail and refuse to provide access to and a right to inspect our books and records including any side lists which are necessary to determine the requesting individual's position or priority of dispatch within the referral system and to further determine whether the referral process is being operated property.

WE WILL NOT request any employer to refuse to hire travelers or any other job applicant in violation of Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause any employer to refuse to hire or lay off or otherwise terminate travelers or any job applicant in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL maintain and enforce our hiring hall practices in a manner that neither requires nor encourages travelers or

other job applicants to give up employment referral opportunities to permit dispatch of Locat 357 members.

WE WILL make Michael J. Cieklinski, Richard Brian Henderson, Al Nairn and other affected travelers whole, plus interest, for any loss of earnings and other benefits suffered by them as a result of our unlawful actions.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO

JULY 15, 2005

Re: International Brotherhood of Electrical Workers
Local Union No. 357

(Newtron Heat Trace, Inc.)
Case 28-CB-5957
(Mandalay Resort Group)
Case 28-CB-6013

Pursuant to Section 102.52 of the National Labor Relations Board's Rules and Regulations, at the request of Michael J. Cieklinski,* Case 28-CB-5957 Charging Party, the following summary is provided setting forth the basis of my Revised Compliance Determination made concerning Respondent's obligations under the Board's Decision and Order in the above captioned matter. Respondent has agreed to the terms of my Compliance Determination and to make the payments and take the action necessary to satisfy the Determination. I understand that Cieklinski disagrees with this Determination including the Determination as to his current registration status with Respondent and the backpay owed to him.

If you disagree with the Compliance Determination as set forth in this letter you have the right, pursuant to Section 102.53 of the Board's Rules and Regulations to appeal my Determination initially to the Acting General counsel of the Board and subsequently, to the board by filing a request for review.

BACKGROUND

By Decision and Order dated December 16, 2004, reported at 343 NLRB No. 136 the Board ordered Respondent to:

(a) Maintain and enforce its established hiring hall practices and procedures in a manner that does not coerce travelers to surrender employment referral opportunities to permit dis-

* Mr. Cieklinski made no request to Cornele A. Overstreet.

patch of Local 357 members.

(b) Make Michael J. Cieklinski, Richard Brian Henderson, and Allan Nairn whole, plus interest, for any loss of earnings and other benefits suffered by them as a result of Respondent's unlawful conduct, in the manner set forth in the remedy section of the Administrative Law Judge's Decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records in the possession of Respondent including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its hiring hall in Las Vegas, Nevada copies of a Notice. Copies of the Notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

To date, Respondent has complied with certain of the affirmative actions required by the Board, including:

(1) Maintaining and enforcing its established hiring hall practices and procedures so as not to coerce travelers to surrender employment referral opportunities to permit dispatch of members of Respondent by ceasing, on June 28, 2004, its practice of requiring travelers to register on a side list used for dispatch only after all members of Respondent have been dispatched.

(2) Posting the Board notices on January 13, 2005 and providing to this Office a Certification of such postings.
(3) Providing to this Office records necessary to calculate backpay amounts owed to Cieklinski, Henderson and Nairn.

The Charging Parties have raised no objection with respect to the Notice posting. This Determination concerns the registration status of Cieklinski, the allocation of backpay between Respondent and Newtron Heat Trace, Inc. (Newtron), since Newtron entered into an informal Board settlement of Case 28-CA-18754 concerning employment of Cieklinski and Henderson, and the amount of backpay in wages and benefits owed to Cieklinski, Henderson, and Nairn.

Book 1 Status

As explained by Administrative Law Judge Lana park (the ALJ) in her decision Respondent maintains four groupings of books as they are called by the hiring hall users for purposes of referring hiring hall applications to available jobs. Those who register in Book 1 are the first to be referred to such jobs. The eligibility criteria for Book 1 as described in the Inside Construction collective-bargaining agreement (the Agreement) between Respondent and various employers are:

> All applicants for employment who have four (4) or more years experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman examination given by a duly constituted Inside Construction Local Union of the IBEW or have been certified as a journeymen wireman by any Inside Joint Apprenticeship and Training Committee and who have at lest one (1) year in the last four (4) years in the geographical area covered by the collective bargaining agreement.

Section 3.09 of the Agreement defines resident as a person "who has maintained his permanent home in the above defin-

ed geographical area for a period of not less than one (1) year or who, having had a permanent home in this area, has temporarily left with the intention of returning to this area as his permanent home." Section 3.08 of the Agreement specifies the geographical area as "clark and Lincoln Counties and that portion of Nye County south of the Mt. diablo Base Line, State of Nevada." As applied, applicants must work a certain number of hours during the previous year in order to register for Book 1. Working fewer than the requisite hours qualify applicants for Books 2 through 4, where the residency requirement does not apply.

Respondent permitted Cieklinski to register in its Book 1 during the applicable backpay period including on March 7, 2003. Respondent urges that since his return to the Las Vegas area to seek work in 2002, at which time Respondent referred him from Book 1 to a job with Dyna Electric at the Nevada Test Site, Cieklinski was (sic) not been a permanent resident of Las Vegas because he has maintained a California address and driver's license and did not register to vote in Nevada. Respondent made this same argument at hearing in the above-captioned cases. The ALJ rejected this argument when she found that "...while he continued to maintain a residence in Las Vegas, he obtained work in Los Angeles, California as a traveler" and footnote 21 that followed in which the ALJ found that the evidence did not support Respondent's conclusion that since September, 2002 Cieklinski has been ineligible to sign Book 1 because of this change in residency. (ALJ, slip. op. p.11) According to Respondent, it removed other registrants from Book 1 because they are not residents. The Region was able to confirm one such removal. The investigation disclosed several hiring hall users who registered in Book 2 until such time as they were able to establish their residency and work the requisite number of hours to qualify for Book 1.

According to Cieklinski he is a resident of Las Vegas based

on his ownership of a condominium at 4338 Caliente in Las Vegas in the late 1990s, sharing a rental home at 3987 Midas in Las Vegas in 1997 to 1999, living in his wife's recreational vehicle located in an RV park in Las Vegas in 2002 to 2003 and renting a room in Henderson, Nevada since March 1, 2005. He also asserts that his residency is shown by his actions directing that all pension contributions on his behalf, including those made by employers outside the Las Vegas area, be made to Respondent's pension plans. He confirmed that his driver's license is from California, albeit for a post office north of Victorville California, that he voted in the 2004 presidential election in Victorville, and that his children attended school in Victorville. he is unwilling to apply for a Nevada driver's license, or to relocate his family to Las Vegas without Book 1 status.

Cieklinski lived in his recreational vehicle at a Hitchin' Post RV Park in Las Vegas, Nevada from July 2002 until August, 2003.[1/] In a charge he filed against Respondent on May 14, in Case 28-CB-5957, and a charge he filed against Newtron on May 28, in Case 28-CA-18754, Cieklinski also listed his address in Victorville, California. He showed this same address in the affidavits he gave in the investigation of these cases. His written communications with Respondent in March and April also show the Victorville address. The separate, non-Board settlement agreement Cieklinski entered into on March 8, 2004 with Newtron, at the same time the parties entered into the informal Board settlement of Case 28-CA-18754 recites that Cieklinski is a resident of San Bernadino County, State of California. Although he has stated that he is now renting a room in henderson, Nevada, Cieklinski has never used any address in official correspondence other than the Victorville address appearing at the start of this letter. The other addresses for Cieklinski were first provided to the Region in an affidavit given by Cieklinski on June 15, 2005.

[1] All dates further dates are in 2003, unless otherwise noted.

I consider the ALJ's finding on Cieklinski's residency to be inclusive up to the time of the hearing on March 9 and 10, 2004, or the issuance of her decision on June 15, 2004. Thereafter, Respondent may establish and enforce its residency requirements consistent with Board Law. The Board has held that a union's use of the residency criteria in itself is lawful in that it is not based on membership or nonmembership in the union or other arbitrary or invidious considerations. See *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425 (1984), enfd. 772 F.2d 571 (9th Cir. 1985). In that case the board interpreted a residency requirement, similar to the one here, and concluded that the alleged discriminatees were residents based on the 18 months that they had lived in Los Angeles County and that, during this period, they "registered to vote in Los Angeles County, obtained California driver's licenses, registered their motor vehicles there, and enrolled their children in local schools." Id., at 425. Here, Cieklinski continues to list his residence as Victorville. He has taken no action to register to vote in Clark County, Nevada, nor did he obtain a Nevada driver's license. Nevada Revised Statute 483.245 provides that when a person becomes a resident of Nevada they must, within 30 days, obtain a Nevada driver's license as a prerequisite to driving any motor vehicle in the State of Nevada. When he gave a supplemental affidavit on June 15, 2005 as part of the compliance investigation, Cieklinski drove to the Las Vegas Resident Office in a rental car from the address in Victorville where he had spent the night.

In all of these circumstances I determine that Cieklinski is not a resident of the Las Vegas area, having failed to do those things the board considered in *IBEW Local 11*, supra, to establish residency. I determine that Cieklinski has failed to qualify for Book 1 registration as a result of his lack of residency in the Las Vegas area and that Respondent has complied with the Board's Order by permitting Cieklinski to sign Book 2 on or about March 1, 2005.

Apportionment of Backpay

Respondent shares backpay liability with Newtron for a portion of the backpay period for Cieklinski and Henderson. Prior to the hearing in the above-captioned cases Newtron entered into an informal Board settlement of Case 28-CA-187 54. The settlement agreement contains the following language:

Backpay - Within 14 days from approval of this agreement the Charged Party will make whole Michael Cieklinski and Richard Brian Henderson by payment to them the amount(s) computed by the Regional Director in accordance with existing Board formula, plus interest. The Charged Party will make payments of $9000 for Cieklinski and $8000 for Henderson. In the event that the General Counsel recovers an amount greater than each amount set forth above for the respective employee from the Respondent International Brotherhood of Electrical Workers, Local 357, AFL-CIO (the "Union"), the Charged Party will be reimbursed so that its contribution for each employee will not exceed 50% of the total amount received for that employee.

Although the settlement agreement does not specify any period of time or any particular employer, Board law provides that when there are two wrongdoers, there should be no double recovery. See *Veta Mines, Inc.*, 36 NLRB 288, 300 (1941). Instead, each wrongdoer should pay its fair share. See *Philadelphia Marine Trade Association*, 138 NLRB 737, 740, 746 (1962), enfd. 330 F.2d 492 (3d Cir. 1964, cert. denied 379 U.S. 833 and 841; *Galveston Maritime Assoc., Inc.*, 139 NLRB 352, 356 (1962), modified 329 F.2d 259 (D.C. Cir. 1964, cert. denied 377 U.S. 993, petition for rehearing denied 379 U.S. 872; *Hendrickson Bros.*, 299 NLR B 442 (1990). The Language of the settlement agreement providing that Newtron's contribution for backpay for each employee will not exceed 50% of the total recovery suggests the "fair share" formula required by the Board. Accordingly,

I determined that the backpay liability period for Newtron is May 27 through August 31. The backpay Newtron has paid will be applied to this period only and may not be used by Respondent for any other liability period to otherwise decrease its liability. I also determine that Respondent and Newtron will equally share the liability for the May 27 through August 31 period, pursuant to the Board's "fair share" formula. This will require Respondent to refund to Newtron a portion of the backpay previously paid by Newtron to Cieklinski and Henderson.

Backpay Wages for Cieklinski

On March 7, the actions of Respondent forced Cieklinski to return a referral he had taken when he declined to be put "on the side," that is, being placed on a side list by Respondent's dispatcher which list is dispatched only after all eligible local members who wanted jobs had been dispatched. From that date until August 1, when he began working full-time for the City of Los Angeles Water and Power Authority (the City job) through IBEW Local 18 in Los Angeles, Cieklinski did not work. he did obtain a dispatch from Respondent to work at Newtron on May 27, but Newtron refused to employ him once he reported to the Newtron jobsite. The ALJ found this action by Newtron to be the result of unlawful conduct by Respondent. Respondent is liable for backpay to Cieklinski for the period March 7 to August 1 when he secured the City job. From May 27 to August 1, before the date the Newtron job ended on August 31, Respondent shares with Newtron liability for backpay to Cieklinski.

For the period March 7 through August 1, based upon hiring hall records supplied by Respondent, Cieklinski also could have taken the job taken by Book 1 registrant David Ramirez on March 21, which continued through March 28. On March 31, Rudy Corral and Tom Samelli, both of whom had numbers in Book 1 higher than Cieklinski, took jobs with Trade

Show Electric. Corral's job ended on April 14, and Samelli's ended on April 15. On April 21 Mark Nolan and Anthony Hyte, both with numbers higher than Cieklinski's in Book 1, took jobs from the side list at Roadrunner. In addition, Michael Marsh, who was in Book 2, also received a call to Roadrunner that day. Nolan and Marsh stopped working on April 23, but Hyte continued to work past May 27, when Cieklinski took the call to Newtron. Thus, Respondent is liable to Cieklinski for six days in March (March 7, 10-12, and 19-20) and three days in April (April 16-18), up to the time that Newtron refused to employ Cieklinski on May 27.

Respondent is also liable to Cieklinski for May 28 and 29, after Newtron refused to employ him on May 27. That liability continued for the first 14 work days in June, until June 20, when Respondent dispatched Book 1 registrant Sebastian Leith from the side list. Leith's job ended on June 23, and Respondent's liability continued for five more days, through June 30. On July 1, Leigh from the side list and Charles Chagnon from book 2 each received calls to Kaleeco. It is unclear when Chagnon's job ended, but Leith's job ended on July 7. On July 10, Cieklinski could have taken a call that went to Book 1 registrant Steven Higbee. That job ended on July 16. On July 24 Cieklinski could have taken a call given to Robert Meteer, a Book 2 registrant. Meteer's job ended on July 27. Cieklinski could not have taken a call to Sturgeon Electric that Book 1 registrant Mike Zimmerman took on July 18 because it required welding, a skill that Cieklinski does not possess. Respondent's liability continued only into July 28, as Cieklinski was able to take calls taken by Steven Higbee at Aero from the side list and John Chalue at Edlen from Book 2 on July 29. Those jobs lasted past August 1, when Cieklinski took the City job that continued until he quit on February 28, 2005. Respondent refused to allow Cieklinski to sign book 1 on March 3, 2005, while permitting him to register in Book 2.

I reject Cieklinski's argument that he would not have taken some of these jobs that have reduced the amount of backpay owed to him because they were of relatively short duration. A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. See *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 (1957). To accept Cieklinski's position that he would have rejected some of these jobs if offered to him is speculative and contrary to the Board requirement that a discriminatee make reasonable efforts to secure interim employment.

To summarize, Respondent is liable for 6 days in March, 3 days in April, 2 days in May, 19 days in June, and 8 days in July, for a total of 38 days. The wages for these 38 days, computed at 8 hours per day at the wage rate set forth in the Agreement of $29.10 for a total of $8,846.40. Of this amount, Respondent shares backpay liability with Newtron for the period Cieklinski would have been employed by Newtron, May 27 to August 1, or 29 days as described above. The wages for these 29 days, computed at 8 hours per day at the wage rate of $29.10 totals $6,751.20. One-half of this amount is $3,375.60, owed by Respondent to Newtron, since Newtron's $9,000 payment to Cieklinski covers both its liability and Respondent's for these 29 days of backpay. Respondent alone owes backpay to Cieklinski for the 9 days prior to May 27, or $2,095.20.

Overtime Pay for Cieklinski

Records provided by Newtron for its job where it refused to employ Cieklinski reflect that during the period June 1 through August 31 employees averaged 42 hours of overtime. Thus, I determine that Cieklinski is entitled to 42 hours of overtime pay at the rate of time and one-half of $29.10 per hour or $43.65 for a total of $1,833.33. Of this amount, Respondent shares backpay liability with Newtron. One half of $1,833.33 is $916.67, owed by Respondent to Newtron

since Newtron's $9,000 payment to Cieklinski covers both its liability and Respondent's for the overtime.

Backpay Health Benefits for Cieklinski

Because he was not considered a civil service employee, Cieklinski was not permitted to participate in the health and welfare plan covering other employees during his employment on the City job. Instead, Cieklinski initially received $4.74 per hour in addition to his base wage in lieu of health and welfare insurance coverage when he started working the City job on August 1. At some point thereafter, this amount increased by $1.00 to $5.74 per hour. By letter dated August 6, 2003, mailed to Cieklinski at his Victorville, California address, the Electrical Workers Health and Welfare Fund (the Fund) advised him that his health coverage ceased on July 31, and permitted him to continue coverage for himself, his spouse, and enrolled dependents at his own expense for a period up to 18 months. Cieklinski elected not to extend the full family medical coverage he previously enjoyed. His wife had previously canceled her medical insurance and did not renew it until July 24, 2004.

During the third quarter of 2003, Cieklinski showed medical expenses of $250.00, For the fourth quarter of 2003 he showed medical expenses of $817.69. During the first quarter of 2004 he showed medical expenses of $448.86. For the second quarter of 2004 he showed medical expenses of $240.57. Using the monthly hours reported for purposes of pension contributions, Cieklinski worked 131.5 hours in September during the third quarter of 2003, earning $623.31 in lieu of the health and welfare contribution. During the fourth quarter of 2003 he worked 502.8 hours, earning $2,383.27 in lieu of the health and welfare contribution. In the first quarter of 2004 he worked 424 hours, earning $2,009.76 in lieu of the health and welfare contribution. During the second quarter of 2004 he worked 536 hours, earning

$2540.64 in lieu of health and welfare contributions. Cieklinski chose not to purchase health insurance, either through the fund or otherwise, explaining that he did not have the money to do so until he had worked several months. Thereafter Cieklinski did not purchase health insurance. After signing Book 2 on March 3, 2005 Cieklinski expected to be covered by Respondent's health and welfare plan, as he was at the time of violations. Respondent, however, states that every person has to put in the required number of hours before becoming covered by Respondent's health insurance. Respondent also notes that it had no part in Cieklinski's decision to quit the City job, at which he was receiving compensation in lieu of coverage.

I determine that Cieklinski is not entitled to reimbursement from Respondent for medical expenses during the period August 1 through March 3, 2005. While reimbursable medical expenses are not offset by interim earnings, reimbursement by a "medical insurance benefit" obtained during interim employment will reduce the amount of the expenses. The per hour extra pay that Cieklinski received while working the City job in lieu of health coverage is akin to a "medical insurance benefit," especially since Cieklinski could have converted that cash into medical coverage through the fund or otherwise or used the money received in lieu of medical insurance to directly pay for the medical expenses incurred by him and his family members. The extra pay he received is more than enough to cover medical expenses he claims.

Backpay Pension Benefits for Cieklinski

Respondent's pension has two components, a defined-benefit plan and a defined-contribution or annuity plan. Together, the cost of Respondent's pension is $7.30 per hour. While he worked the City job Cieklinski received $6.90 per hour in lieu of the pension contribution. Cieklinski did not receive pension credits per se because he was working at a civil

service job and was not eligible for the City job's civil service pension. Cieklinski had the option to transfer this amount to Respondent, and he did so. Respondent credited the entire amount to Cieklinski's Plan B (annuity). He states that Respondent had previously split his pension credits from other locals such as when he worked in San Jose into Plan A (defined benefit) and Plan B (annuity). He claims that since all of his money was put into the annuity Respondent should give him Plan A credits.

Respondent points out that although the pension contributions for the local whose contract covered the City job is lower than Respondent's, the wages under the contract are higher. Respondent thereby contends that the lower pension earned by Cieklinski is offset by the higher wages. However, interim earnings do not offset lost retirement benefits. I determine that Respondent is liable to Cieklinski for the difference in pension benefits between what he would have received if he continued to work through Respondent, and what he did receive and forward to Respondent's pension plan while working the City job, or $.40 per hour. The investigation disclosed that Cieklinski worked a total of 1743.4 hours on the City job. Thus, the total Respondent owes in pension contributions is $697.36 for the period he worked the City job.

For the 9 days of regular time described above for which Respondent is solely liable, Respondent owes Cieklinski pension contributions at the rate of $7.30 per hour or $525.60. For the 29 days of regular time described above, for which Respondent shares liability with Newtron, Cieklinski is entitled to pension contributions at a rate of $7.30 per hour, or $1,693.60. For the 42 hours of overtime described above, for which Respondent shares liability with Newtron, Cieklinski is entitled to pension contributions at the rate of $10.95 per hour or $459.90. Thus, $2,153.50 for pension contributions is attributable to the time Cieklinski would have been employed at Newtron. This amount exceeds the total payments att-

ributable to Respondent and Newtron by $1,738.03. One-half of $2,153.50 is $1,076.75, owed by Respondent to Newtron, of which a payment of its one-half share of $207.73 will bring the total of shared payments to Newtron to $9,000.00. Respondent is responsible for the $1,945.77 balance Respondent owes Cieklinski for pension contributions.

To summarize, Respondent owes Cieklinski $3,168.73 and owes Newtron $207.73 for a portion of the pension contributions paid to Cieklinski by Newtron on behalf of Respondent.

Concerning the allocation of the contributions on behalf of Cieklinski, in the past, Respondent's pension fund has divided the $7.30 per hour pension contributions as follows: $4.10 to Plan A and 43.20 to Plan B. The trustees of the fund have agreed to permit this division for the contributions received from the City job on behalf of Ciekliniski, that were initially all placed in Plan B, to be divided between the two plans consistent with the standard allocation stated above.

Travel Costs for Cieklinski

Cieklinski contends that by working the City job his travel costs increased. He compares the cost of traveling to work in Las Vegas from his wife's motor home located at a Las Vegas RV park to the cost of traveling to work at the City job from his home in Victorville, California. As stated above, Cieklinski has always maintained his residence in Victorville, California. Considering that his residence is located there Cieklinski's commuting costs decrease with his City job as compared to commuting from Victorville to Las Vegas. In these circumstances I determine Cieklinski is not entitled to deduct commuting costs from wages earned at the City job.

Backpay for Henderson

Henderson accepted a referral to Newtron on May 16, and

was laid off on July 3, as a result of Respondent's unlawful conduct. During his period of employment Newtron assigned no overtime work to Henderson. The ALJ relied on evidence that Respondent's steward on the Newtron job informed the Newtron general foreman that employees would refuse to work overtime if Newtron assigned it to Henderson. Respondent and Newtron share liability for Henderson's back pay from July 3 to the date the Newtron job ended on August 31, and for overtime during his entire employment by Newtron. Respondent is liable for Henderson's back pay from July 3 forward, including on and after September 15, when Respondent's actions caused Henderson to give up a referral to Dyna Electric at Mandalay Bay. During this period two Employers, Mojave Electric and Bombard Electric, treated Henderson as ineligible for rehire. Respondent contends that Henderson should have contacted Mojave, in which case Mojave probably would have removed the prohibition against him. This contention is speculative, and Henderson had no reason to believe that Mojave's ban was not permanent. Newtron has already paid Henderson $8,000.00 in backpay as part of the informal Board settlement of Case 28-CA-18754.

After he was laid off by Newtron Henderson could have taken two jobs with Edlen, one beginning on July 4 and ending July 27, which was taken by Book 2 registrant Robert Meteer and another beginning July 29, and ending August 4, which was taken by Book 2 registrant John Chalue. On August 19 Henderson could have taken a four-day referral to Aero that was taken by Book 2 registrant William Casillas. On August 28 Respondent states that 23 jobs were unfilled. Even if those jobs are not considered Henderson could have taken a position at Choice the Book 1 registrant Leo Torda took from the side-list on September 4 and which lasted several months. Notwithstanding the length of Torda's job, the analysis of Respondent's backpay liability to Henderson begins again on September 15 when Respondent's action forced him to return his referral.

After being forced to turn back his referral to Dyna on September 15 Henderson worked at several jobs referred by Respondent. On October 15 he was referred to Sturgeon Electric where he worked until October 23. He could have taken another position at Sturgeon, which was taken by Book 2 registrant Don Wright on October 28. That job continued until December 29 and on December 30 Henderson could have taken a job at Trade Show Electric taken by Book 2 registrant Ron Olsen. Olsen's job ended January 14, 2004. The next job Henderson could have claimed was at Edlen, which was taken by Book 2 registrant Phil Dees on January 22, 2004, which lasted through January 28, 2004. Dees was sent out again to Aero on a job lasting until January 29-30, 2004. Henderson then could have had the job taken by Dees on February 2, 2004 at Titan, which lasted until May 28, 2004. The next job Henderson could have taken was June 22, 2004, when Bryan Lambert took a referral to McLane. That job ended on Friday, June 25, 2004. On Monday, June 28, 2004 Respondent eliminated the side list practice after the ALJ decision on June 15, 2004.

Based on the foregoing I determine that Respondent is liable to Henderson for 14 work days in July, 13 work days in August, 14 work days in September, 11 work days in October (for a total of $12,105.60); 5 work days in January, 2004 ($1,184.00); and 15 work days in June, 2004 ($3,642.00). This equals 72 days or $$16,931.60. Of this amount Respondent shares liability with Newtron for the period Henderson would have continued to be employed by Newtron, July 3 through August 31, or 27 days as described above. The wages for these 27 days, computed at 8 hours per day at the wage rate of $29.10 totals $6,285.60. One-half of this amount is $3,142.80, owed by Respondent to Newtron since Newtron's $8,000 payment to Henderson covers both its liability and Respondent's for these 27 days of backpay. Respondent alone owes backpay to Henderson for the 45 days after August 31. The wages for these 45 days, computed at 8 hours per

day at the wage rate of $29.10 totals $10,476.00.

Utilizing the same record provided by Newtron to compute overtime for Cieklinski, I determine that Henderson is entitled to 42 hours of overtime for the Newtron job, at the rate of time and one half of $29.10 per hour, or $43.65, for a total of $1,833.33. Of this amount Respondent shares backpay liability with Newtron. One-half of $1,833.33 is $916.67 but the total liability for wages, based on regular and overtime pay, owed by Respondent and Newtron to Henderson, exceeds the $8000.00 Newtron has already paid to Henderson by $118.93. Therefore, I will reduce the amount Respondent owes to Newtron by one-half of $118.93 or $59.46, leaving Respondent owing Newtron $857.20 and Henderson $976.13. In addition to overtime Henderson would have worked for Newtron, he also would have worked one Saturday and earned $349.20 on that day, for Dyna Electric at Mandalay Bay, had he not been coerced into returning his referral on September 15. Respondent is responsible for this entire amount.

Respondent is liable to Henderson for 72 straight-time days of pension contributions. At 8 hours per day this totals 576 hours at $7.30 per hour or $4,204.80. Having exhausted the $8,000.00 paid by Newtron, this liability is owed by Respondent alone. For the 50 hours of overtime described above Respondent owes pension contributions to Henderson at a rate of $10.95 per hour or $547.50. In sum, pension contributions owed by Respondent to Henderson total $4,752.30.

For medical expenses Henderson claims the cost of certain dental work on April 28, 2004 in the amount of $2,032.00, prescription costs during the period of February through June 2004 totaling $158.43, and a doctor's visit on April 5, 2004 costing $40.00. With regard to the dental expense I have applied a $100.00 deductible required by Respondent's coverage and the 80% payment allowed, for an expense of $1,545.60. For the prescription costs I have deducted the $5.00 co-

pay for each prescription purchase provided for by Respondent's coverage, leaving a total expense of 4133.43 for five purchases. I have not shown the doctor's visit as an expense, since there is no showing that Henderson had met his $200.00 annual deductible required by Respondent's coverage. I det-ermine that the total medical expenses owed by Respondent to Henderson are $1,679.03.

Backpay for Nairn

Like Henderson, Nairn accepted a referral to Dyna Electric at Mandalay Bay on September 15, which he gave up as a result of actions by Respondent. I determine that Respondent is liable for Nairn's back pay and pension credits from September 15 to November 14 when he began work for Bechtel.

Larry Hollen, a traveler from IBEW Local 640 in Phoenix, accepted a referral to Mojave Electric on October 1, and worked there through October, 2004. Hollen's number on the Book 1 out-of-work list was 243 when he received the referal. Nairn's number was 216, and he could have accepted the call. Hollen stated that the job required scissor-lift, zoom-boom, and forklift capability, all of which Nairn is qualified to perform. Nairn admits he was not at the hall October 1, the day Hollen accepted the referral to Mojave. I determine that Respondent's backpay liability to Nairn consists of 12 work days from September 15 to October 1, amounting to $2,841.60, plus one Saturday of 8 hours of overtime equal to $349.20, for a total of $3,190.80. Similarly, Respondent is liable for 12 days of pension credits on behalf of Nairn. At 8 hours per day this totals 96 hours at $7.30 per hour, or $700.80. The pension credits Respondent owes Nairn for the lost Dyna overtime equal equal $87.60, for a total pension credit obligation of $788.40. Nairn has not claimed any medical expenses.

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Summary

Payments concerning Cieklinski
Description of Payments:

Wages (9 days) to Cieklinski - $2,095.20;
Pension Contributions to Cieklinski - $1,222.96;
Pension Contributions (Newtron Job) - $1,945.77;
Total Payments to Cieklinski - $5,263.93.

Wages (29 days) to Newtron - $3,375.60;
Overtime to Newtron - $916.67;
Pension to Newtron - $207.73;
Total Payments to Newtron - $4,500.00.

Payments concerning Henderson
Description of Payments:

Wages (45 days) to Henderson - $10,476.00;
Overtime to Henderson (Newtron, Dyna) - $1325.90;
Pension Contributions to Henderson - $4,752.30;
Medical Expenses to Henderson - $1,679.03;
Total Payments to Henderson - $18,233.23.

Wages (27 days) to Newtron - $3,142.80;
Overtime to Newtron - $857.20;
Total Payments to Newtron - $4,000.00.

Payments concerning Nairn
Description of Payments:

Wages (12 days) to Nairn - $2,841.60;
Overtime to Nairn (Dyna) - $349.20;
Pension Contributions - $788.40;
Total Payments to Nairn - $3,979.20.

Cornele A. Overstreet
Regional Director

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(3)

CASE NO. 07-190

FILED
NOV 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 2006

MICHAEL CIEKLINSKI AND ALLAN NAIRN,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

Michael Cieklinski, and
Allan Nairn, *Pro Se*
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QUESTION PRESENTED FOR REVIEW

May an appeals court **affirm** a tainted Decision and Order by two National Labor Relations Board *members* (pilloried in a Chairman's dissent) designed to overrule an Administrative Law Judge's Decision, Order, and Compliance Determination made **after a fair trial**, or **affirm** a Regional Director's Revised Compliance Determination that stripped a "charging party" of his collective bargaining agreement "out-of-work list" status, and proved that Local Union 357, the **NLRB's certified** *exclusive bargaining representative* of **Employees**: did not offer Petitioners, who lived and worked in Las Vegas for 22 years and 12 years, respectively, "membership" within 30 days, *as required by law*; dispatched its own *members* to **Employers'** jobs before them; took their CBA "wages" for its won Trusts, Funds and committees; assaulted and blacklisted them for demanding "equal rights"; made **Employers'** supervisors "members" for blacklisting "non-members"; and routinely lied to, cheated, and stole form these nonmembers and all others, in the face of federal laws.

LIST OF ALL PARTIES

Petitioners/Appellants Michael Cielinski, and Allan Nairn, and Respondent National Labor Relations Board.

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REASONS FOR GRANTING A REHEARING

I. An Administrative Law Judge presided over the NLRB trial and filed a Decision, an Order and Compliance Determination in Petitioners' favor, a Board reviewed the ALJ's rulings and eviscerated them in an *ex post facto* Decision and Order by two members who out-voted the Board chairman, a regional director abused her Revised Compliance Determination to negate one charging Petitioner's Group One out-of-work list status which, like that Board's Decision and Order, conflicted with decisions of this Court, and other appellate and district courts, departed from the usual course of such judicial proceedings, and requires the exercise of this Court's powers of supervision.

TABLE OF AUTHORITIES

Beck v. Communications Workers of America, 468 F.Supp. 93 (1979), affd., 776 F.2d 1187 (4th Cir. 1985); *aff'd en banc*, 800 F.2d 1280 (1986); *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988)

Int. B'hood Elec. Wkrs. L.U. 357, et al., 343 N.L.R.B. No. 136 (2004)

N.L.R.B. v. Laborers' Union, 748 F.2d 1001 (5th Cir. 1984), cert. denied, 105 S. Ct. 1845 (1985)

N.L.R.B. v. Mike Yurosek & Sons, Inc., 53 F.3d 261, 265 (9th Cir. 1995)

New England Telephone and Telegraph Co. v. Int'l B'hood of Elect. Wkrs. 384 F. Supp. 752 (D. Mass. 1974)

Radio Officers' Union of Commercial Telegraphers, 74 S. Ct. 323 (1954)

Retlaw Broadcasting Co. v. N.L.R.B., 53 F.3d 1002 (9th Cir. 1995)

Wooddell v. IBEW Local 71, 116 L.Ed.2d 419 (1991)

CITATIONS TO OPINIONS BELOW

Int. B'hood of Elect. Wkrs. Local 357 AFL-CIO (Newtron Heat Trace, Inc.) and Michael Cieklinski, et al., Cases 28-CB-5957, and 28-CB6013 (presiding ALJ's Decision, Order, and Compliance Determination, dated June 15, 2004), NLRB Decision and Order, dated December 16, 2004, and Revised Compliance Determination, dated July 15, 2005 (343 NLRB No. 136). See Petitioners' Supplemental Appendix.

STATEMENT OF JURISDICTIONAL GROUND

Federal Rule of Appellate Procedure 15 (a) provides for appeals from National Labor Relations Board's Decisions and Orders, and includes Compliance Determinations – revised or not – by regional directors, and others, delegated or not, as per sections of Labor Management Relations Act §§ 153, and 159 (29 U.S.C. §§ 153, 159), and this Court may review this matter under 29 U.S.C. § 1254(1), and its Rules 10 and 44.

TABLE OF STATUTES

Labor Management Relations Act . § 141,
(29 U.S.C. § 141)

Labor Management Relations Act ("LMRA")
§158(a)(3), (29 U.S.C. § 158)

L.M.R.A. § 15(b)(1)(A) (29 U.S.C. § 158)

L.M.R.A. § 158 (b)(2) (29 U.S.C. § 158)

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*Respondent NLRB uses "NLRA" rather than L.M.R.A. cites.

RESTATEMENT OF THE CASE

The International Brotherhood of Electrical Workers ("IBEW") certifies 40 classifications of "members," but those in construction local unions ("LU") violate provisions of its constitution/contract with local unions and members most, as well as the Labor Management Relations Act, and the Labor Management reporting and Disclosure Act, but Las Vegas based L.U. 37 abuses those laws with tribalistic criminal practices that are anathema almost everywhere in America.

However, an ongoing myth that the government-certified L.U. 357 "exclusive bargaining representative" of Employees will also "manage" CBA Employers job "Referral Procedure" may be the most outrageous scam in American labor law. [1]

A. THE TRIAL, AND BACKGROUND

The abuses were proved at the NLRB trial, and included: an ass't business manager's threat that Cieklinski will never be a L.U. 357 "member" if he asserts his Group One rights; dispatcher Large's threat that he would be "fired" after 41 hours for accepting a job offer in his turn; members' threats of assault, and battery against Cieklinski, Nairn, and Richard Henderson (who, like L.U. 357's business manager-boss was from North Carolina, and got a generous settlement); tenuous testimony of L.U. 357' and Appeals Committee officer Miles, job dispatcher Large, and IBEW's representation Tilmont that was equivocal at best, and ignored the fact that attitudes of L.U. 357 members were inflamed at monthly

[1] The ALJ mis-stated L.U. 357 represents general foreman" and could be an "exclusive source of referrals of employees."

meetings (please see Petitioner's Supplemental Appendix, at pp. 7-11)

L.U. 357's members "questioned and jibed" Henderson, threatened to "whip [his] ass," "set [him] on fire," cursed him, and "blocked his way" to receive a "job referral" which L.U. 357 dispatcher Bennington delayed to see if the abuses worked, or Henderson accepted a job (Supp. Apx. Pp. 12-15).

L.U. 357 Agent/Dispatcher Large testifies a "commotion was going on," and that "arguments" in the hiring hall were "common," but Juanita Hall, who worked out of that "hiring hall" since 1995, said she never saw any argument, and L.U. 357 stated in its posthearing brief that, "what was said to [Henderson} cannot be debated" (Supp. Apx. Pp. 11-15).

L.U. steward Egge, on a Big Horn powerhouse, told Newtron Heat Trace, Inc. supervisor Bellard a **book jumper,** Henderson, was referred to that job before he arrived, and Egge asked that supervisor to deny Henderson employment, with threats of "wires being cut," "people not showing up for work" and "concrete being poured down pipes" if Henderson was "spun" (rejected), but Henderson was already hired. (Egge denied the statements, but superintendent Bellard was found to be "forthright and sincere," whereas Egge was not.

L.U. 357's assistant superintendent Westover weighed in to state "the company should do the right thing, "and he was not happy with "book jumpers," and offered Mr. Bellard "a [membership] ticket [in L.U. 357] down the [road] for you." However, it is important to note that Henderson accepted his job offer in his turn, didn't "book jump," and Mr. Westover later "denied having any such conversation with Bellard." (Supp. Apx. At p. 16)

Mr. Bellard hired Henderson, but within the first week Union steward Egge told Bellard he "did not like having [the properly referred] Henderson on the job, [and] that nobody else liked having a book jumper on the payroll," Bellard said "work[ers] are slowing down," and Egge stated "if Newtron got rid of the "traveler" more work would get done faster," and discouraged "overtime" work (Supp. Apx. pp.16-17).

Shortly after May 23, 2003 Ciekliinski went to the CBA-created hiring hall to also accept a job offer by Newton, and was directed to report to Newtron on May 27, 2003, but the L.U. 357 members yelled and screamed at him, and verbally attacked Henderson, and Allan Nairn, while L.U. 357 agents Large, another dispatcher, Poma, Bennington, and Westover watched, but Henderson taped those exchanges with L.U. 357 members, who directed loud and confrontational comments, and cursed and swore at him.)Supp. Apx., pp. 18-20).

Westover again telephoned Bellard, who first refused to reject Cieklinski, and Bellars's supervisors first supported his decision, but two days later supervisor Allen told Bellard to not hire Cieklinski, and Bellard told Cieklinski "it was out of his hands." A couple of days later Egge told Bellard that prior to Cieklinski's reporting to the jobsite Egge had warned Allen of potential sabotage problems if they hired Cieklinski. In fact, some sabotage had occurred at the jobsite, but investigation failed to identify the instigator(s), and Egge admitted having dinner with Mr. Allen. (Supp. Apx. p.20).

In June Allen told Bellard he couldn't wait to get rid of the other book jumper (Henderson), and two or three weeks later told Bellard to lay Henderson off, to make it look legitimate – like they weren't picking

also, by lying to them that work is coming to an end. The ALJ found Bellard to be a "forthright and sincere witness." (Supp. Apx. pp.20-21)

Henderson and Nairn signed CBA out-of-work lists again but were harassed by Union members as officers Bennington, Large and Poma watched. After enduring hostile reproaches they left, but were confronted in the parking lot September 15, 2003 by a group of eight people, led by Executive Board chairman Gering (Supp. Apx. Pp.21-24). [2]

B. CONCLUSION

These factual findings, together with the ALJ's cites to relevant authorities and victims' Petition to this Court, should prompt, at minimum, a circuit court's remand to the NLRB.

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[2] Gering's verbal assaults on Henderson, and Nairn, included pepperings of the f___ word, interspersed with illogical, tribalistic nonsense meant to cover his inadequate education, which typically results in physical violence if perpetrators have time to be frustrated enough, but Mr. Nairn voluntarily gave a job referral back, as Large watched, and the two left.

Certification of Parties Unrepresented by Counsel

This petition for the rehearing of a decision, and entry of an order denying a petition for writ of certiorari No. 07-190, dated October 9, 2007, is presented in good faith and not for any delay.

Payment of a required filing fee of $200.00 is included.

Petitioners certify this "petition for rehearing" is limited to intervening circumstances of a substantial, or a controlling effect and other substantial grounds not previously presented.

Dated: 11-19-07

Michael Cieklinski

11-19-07

Allan Nairn

PROOF OF SERVICE

Michael Cieklinski and Allan Nairn, Petitioners,	)	Case No. 07-190
	)	Appeal No. 05-75079
v.	)	
National Labor Relations Board Respondent.	)	Nos. 28-CB-6013 28-CB-5957

The undersigned declares under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the above-named person with the following documents:

PETITION FOR REHEARING

I delivered the documents in the following manner:

X By placing a copy in a separate envelope, with postage fully prepaid, for each address named below.

Aileen A. Armstrong
National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
Tel 202-273-2960

Executed on November 19, 2007 at Las Vegas, Nevada.

Barbara Lockhart